# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1931

No. 821

GULF STATES STEEL COMPANY AND NATIONAL SURETY COMPANY, PETITIONERS,

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1932

CERTIORARI GRANTED APRIL 25, 1932

(36,635)



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INDEX


| | Original | Print |
|---|---|---|
| Proceedings in United States circuit court of appeals, fifth circuit | a | 1 |
| Caption (omitted in printing) | a | |
| Record from district court of the United States, Northern Alabama | 1 | 1 |
| Complaint | 1 | 1 |
| Exhibit "A"—Bond for $175,350.00 | 20 | 12 |
| Exhibit "B-1-2"—Bond for $200,000 | 22 | 13 |
| Exhibit "B-3-4"—Power of attorney, etc | 25 | 15 |
| Exhibit "B-5"—Authorization to deposit bonds as collateral | 28 | 16 |
| Exhibit "C-1"—Surety bond for $200,000.00 | 30 | 18 |
| Exhibit "C-2"—Certificate of appointment of resident vice-president | 33 | 19 |
| Exhibit "C-3"—Certificate of appointment of resident assistant secretary | 36 | 21 |
| Demurrer of Gulf States Steel Co | 39 | 23 |
| Demurrer of National Surety Co | 41 | 24 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 21, 1932

| | Original | Print |
|---|---|---|
| Pleas of Gulf States Steel Co | 42 | 24 |
| Pleas of National Surety Co | 46 | 26 |
| Demurrer of United States to plea of Gulf States Steel Co | 50 | 28 |
| Demurrer of United States to plea 2 of National Surety Co | 51 | 29 |
| Judgment | 52 | 29 |
| Bill of exceptions | 54 | 30 |
| Caption | 54 | 30 |
| Offers in evidence | 55 | 31 |
| Assessment certificate | 55 | 31 |
| Claim for abatement | 59 | 34 |
| Certificate of assessment | 63 | 36 |
| Letter rejecting claim, December 4, 1925 | 64 | 37 |
| Letter from Commissioner, May 12, 1926 | 68 | 39 |
| Proceedings before U. S. Board of Tax Appeals | 71 | 41 |
| Certificates as to transcript | 71 | 41 |
| Docket entries | 74 | 42 |
| Order dismissing cause, United States circuit court of appeals | 78 | 45 |
| Clerk's certificate | 79 | 45 |
| Motions for extension of time and orders granting same | 81 | 46 |
| Notice of petition for review | 90 | 51 |
| Petition for review | 91 | 51 |
| Order denying motion to vacate | 100 | 56 |
| Order setting motion to vacate | 101 | 57 |
| Notice of hearing | 102 | 57 |
| Motion to vacate | 103 | 58 |
| Order of redetermination | 104 | 58 |
| Findings of fact and opinion, Green, M | 106 | 59 |
| Motions for extension of time | 117 | 66 |
| Stipulation re exhibits | 119 | 68 |
| Motion for extension of time | 121 | 68 |
| Answer of Commissioner to amended petition | 122 | 69 |
| Order setting cause | 129 | 74 |
| Motion for extension of time | 130 | 74 |
| Stipulation as to hearing | 131 | 75 |
| Notice of filing answer | 132 | 75 |
| Motion to file amended petition | 133 | 76 |
| Amended petition | 135 | 76 |
| Motion for continuance | 150 | 86 |
| Answer of Commissioner | 151 | 86 |
| Motions for extension of time | 157 | 90 |
| Petition | 159 | 91 |
| Requested charges to jury | 173 | 100 |
| Verdict | 174 | 100 |
| Motions for new trial | 175 | 101 |
| Order settling bill of exceptions | 176 | 102 |

| | Original | Print |
|---|---|---|
| Stipulation as to testimony | 177 | 102 |
| Petition for appeal | 178 | 103 |
| Order allowing appeal | 180 | 104 |
| Assignments of error | 182 | 105 |
| Bond on appeal | (omitted in printing) | 186 |
| Clerk's certificate | (omitted in printing) | 188 |
| Argument and submission | 190 | 109 |
| Opinion, Hutcheson, J | 190 | 109 |
| Dissenting opinion, Sibley, J | 196 | 115 |
| Judgment | 200 | 119 |
| Petition for stay of mandate | 201 | 121 |
| Order staying mandate | 202 | 121 |
| Clerk's certificate | 203 | 122 |
| Order allowing certiorari | 204 | 123 |



[fols. a & b-f] [Caption omitted]

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION**

At Law. No. 3723

UNITED STATES OF AMERICA, Plaintiff,

vs.

GULF STATES STEEL COMPANY, a Corporation, and NATIONAL SURETY COMPANY, a Corporation, Defendants

COMPLAINT—Filed August 25, 1930

The United States of America, the plaintiff, by its attorney, Charles B. Kennamer, United States Attorney for the Northern Judicial District of Alabama, complaining of the defendants, for cause of action, alleges:

I

That plaintiff is a corporation sovereign and body politic.

II

That the defendant, Gulf States Steel Company, at all times herein mentioned, was, and now is, a corporation [fol. 2] duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to transact business in the State of Alabama and has an office and place of business, at which it may be served with process herein, at Birmingham, Jefferson County, in the Southern Division of the Northern Judicial District of Alabama, within the jurisdiction of this Court.

That the defendant, National Surety Company, at all times herein mentioned, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business in the State of Alabama, and has an office and place of business, at which it may be served with process herein, at Birmingham, Jefferson County, in the Southern Division of the Northern Judicial District of Alabama, within the jurisdiction of this Court.

III

That on the respective dates of the execution and delivery of the several instruments of writing obligatory hereinafter more fully set forth, W. E. Snead, mentioned in the said instruments, was, and he now is, the duly appointed, qualified and acting United States Internal Revenue Collector for the Internal Revenue Collection District of Alabama, and, as such, charged with the collection of all revenue in said district imposed by the Internal Revenue Laws of the United States and with accounting therefor and turning over of the same to this plaintiff; that the said several instruments were [fol. 3] executed and delivered to him in his said official character and as a representative of the United States of America, charged with the performance of the duties aforesaid and as incident to and as a means of accomplishment thereof, to save the United States of America from sustaining loss and to prevent the collection being jeopardized of an internal revenue tax then imposed by law, duly assessed against and owing by one of the defendants, namely, the Gulf States Steel Company, by reason of the action then taken by the plaintiff at the request of the said Gulf States Steel Company, in suspending the collection of such tax pending the consideration of a claim for abatement thereof duly filed by the said defendant for that purpose, pursuant to the Internal Revenue Laws of the United States and the Rules and Regulations thereby authorized and duly prescribed, promulgated and published; wherefore the United States of America is entitled to receive the proceeds of recovery herein and as such party really interested prosecutes this suit of civil nature, at common law, founded on contract arising under laws of the United States, providing for internal revenue, which suit is authorized and sanctioned by the Attorney General of the United States at the request of the Commissioner of Internal Revenue.

IV

That, on, to-wit, March 28, 1918, as required of it by an Act of Congress, approved September 8, 1916, entitled "An Act to increase the revenue, and for other purposes" and [fol. 4] an Act of Congress, approved October 3, 1917, entitled "An Act to provide revenue to defray war expenses, and for other purposes", the defendant, Gulf States Steel

Company, filed with the Collector of Internal Revenue for the District of Alabama, its corporation income and excess profits tax returns for the calendar year begun January 1, 1917, and ended December 31, 1917; that said returns showed a tax due to plaintiff in the amount of Nine Hundred Eighty-nine Thousand, Seven Hundred Ninety Dollars and Fifty-seven Cents ($989,790.57), which was duly assessed and the same was, on or about June 25, 1918, paid. Thereafter, the Commissioner of Internal Revenue examined said returns and found the true tax liability of the said Gulf States Steel Company to be greater for the said year 1917 than the amount disclosed by the return to the extent of One Hundred Fifty-three Thousand, Eight Hundred Fifteen Dollars and Thirty Cents ($153,815.30), which said amount he assessed as additional taxes, on the April, 1921, list of income tax assessments, against the said Gulf States Steel Company and which amount then became due and payable upon notice and demand served by the Collector of Internal Revenue for the said Collection District of Alabama.

V

That on, to-wit, May 2, 1921, the said Collector of Internal Revenue for the Collection District of Alabama served notice and demand on the said Gulf States Steel Company with respect to the said assessment of additional tax, One [fol. 5] Hundred Fifty-three Thousand, Eight Hundred Fifteen Dollars and Thirty Cents ($153,815.30); but, notwithstanding the same, the said assessment and every part thereof remained unpaid; that on, to wit, May 6, 1921, the Gulf States Steel Company filed with the aforesaid Collector of Internal Revenue its claim for the abatement of the full amount of such assessment of additional taxes.

VI

That on, to-wit, March 13, 1923, the said assessment of additional tax of One Hundred Fifty-three Thousand, Eight Hundred Fifteen Dollars and Thirty Cents ($153,815.30) then being unsatisfied as to every part thereof and said claim for abatement thereof then being in pendency before the Commissioner of Internal Revenue but still unconsidered and undetermined, and the aforesaid Collector of Internal Revenue then demanding payment of the said

sum, assessed as aforesaid, at the City of Birmingham, Jefferson County, State of Alabama, in the United States Internal Revenue Collection District of Alabama, and in the Southern Division of the Northern Judicial District of Alabama, in consideration that the plaintiff, through its said Collector of Internal Revenue, refrained from and suspend the collection of the said tax assessed as aforesaid, pending the filing by said Gulf States Steel Company of additional facts in support of its claim for abatement of said tax so assessed, the said Gulf States Steel Company as principal, and the American Surety Company of New [fol. 6] York as surety, duly executed and delivered to W. E. Snead, as Collector of Internal Revenue, District of Alabama, their certain writing obligatory, duly signed with their respective corporate names and sealed with their respective corporate seals, whereby they firmly bound themselves, their successors, heirs, executors, and administrators, jointly and severally, to pay the said W. E. Snead, as Collector of Internal Revenue, District of Alabama, One Hundred Seventy-five Thousand, Three Hundred Fifty Dollars ($175,350.00), a copy of which said writing obligatory is hereto attached, made a part hereof the same as if rewritten herein, and marked "Exhibit A".

Said writing obligatory had a condition therein written in words, figures and symbols as follows, to-wit:

"The condition of the above obligation is such that, if the said Gulf States Steel Company will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and expense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand, Eight Hundred Fifteen and 30/100 Dollars ($153,815.30) claimed of it under the War Revenue Act of 1917, pending the filing by said Gulf States Steel Company of additional facts and information in support of a claim [fol. 7] for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect."

VII

That, upon the delivery of the said writing obligatory, the plaintiff, through its said Collector of Internal Reve-

nue, refrained from all proceedings to collect the aforesaid assessment of additional taxes. That nothing was ever received by the plaintiff or its said Collector, by reason of the said writing obligatory, and on, to-wit, April 3, 1925, the said assessment, as plaintiff avers, then remaining unpaid and unsatisfied as to every part thereof and the said claim for abatement thereof then being still pending, open to the production of further evidence in support thereof and undetermined, in consideration that plaintiff relieve the aforesaid American Surety Company of New York of liability on account of the aforesaid writing obligatory, and continue to refrain from the collection of said tax pending consideration of the said claim for abatement, said defendant Gulf States Steel Company, at Birmingham, Jefferson County, State of Alabama, in the Southern Division of the Northern Judicial District of Alabama, delivered to the said Collector of Internal Revenue for the District of Alabama, under the name and style "W. E. Snead, Collector", its certain writing obligatory, and instrument of pledge, duly executed by the signing thereof with the corporate name and affixing thereto the corporate seal of the said defendant by Calvert Brewer, its Assistant Secretary, duly [fol. 8] thereunto authorized by resolution of its Executive Committee, whereby it acknowledged itself to be held and firmly bound unto W. E. Snead, Collector, in the penal sum of Two Hundred Thousand Dollars ($200,000.00) lawful money of the United States for the payment whereof well and truly to be made to him, the said W. E. Snead, as Collector as aforesaid, without relief from valuation or appraisement laws, it firmly bound itself, its successors and assigns.

Said writing obligatory and instrument of pledge had therein written a condition in words, figures and symbols, to-wit:

"The condition of the above obligation is such that, whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand Three Hundred and Fifty Dollars ($175,350.00), and in favor of W. E. Snead, Collector of Internal Revenue for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March, 1923, and was given

in support of a claim for the abatement of assessments, penalties and interests, under the Revenue Act of 1917. Being desirous of relieving the above bound Surety Company and further securing the payment of any amount found to be due the United States Government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, [fol. 9] or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect."

Said writing obligatory had therein written, also, a recital and stipulation, in substance, that the said Gulf States Steel Company did then, in order more fully to secure said W. E. Snead, as Collector as aforesaid in the payment of the sum mentioned in said writing obligatory, pledge, as security therefor, bonds of the United States in the principal sum of Two Hundred Thousand Dollars ($200,000.00), which said bonds were therein stated as being of the numbers and amounts and otherwise more particularly described as follows, to-wit:

"United States Fourth Liberty Loan 4¼% Gold Bonds of 1933-8, interest dates April and October 15th, par value $200,000.00 (coupons), numbers

F00190566;
J00090739;
B00010452/F56;
D00223644;
C00232273/H78;
A00225521/C23;
F00225526/H28
@ $10,000.00 each,

which said bonds were deposited with Federal Reserve Bank of New York on March 24, 1925, for the account of [fol. 10] W. E. Snead, Collector of Internal Revenue, for the District of Alabama."

And it was further set forth in said writing obligatory an instrument of pledge, in substance, that contempora-

neously therewith said Gulf States Steel Company had executed and delivered a power of attorney and agreement in favor of W. E. Snead as Collector as aforesaid, authorizing and empowering him, said Collector as such attorney, to collect or sell the said bonds so deposited, or any part thereof, in case of any default in the performance of any of the conditions or stipulations in said writing.

And plaintiff avers that at the time of delivery of said writing obligatory and instrument of pledge, said Gulf States Steel Company delivered to and deposited the said bonds of the United States as therein described and also delivered to him, the said Collector of Internal Revenue, its certain deed in writing, duly executed with the signing thereto of its corporate name and affixing thereto of its corporate seal by Calvert Brewer, its Assistant Secretary, thereunto duly authorized by resolution of its Executive Committee, and acknowledged before an officer by law authorized to take acknowledgement in such cases, whereby it constituted and appointed W. E. Snead, as Collector, and his successors in office, attorney for said corporation, the Gulf States Steel Company, to collect or to sell, assign and transfer certain United States Liberty Bonds, described as follows, to-wit:

[fol. 11] "United States Fourth Liberty Loan 4¼% Gold Bonds of 1933-8, interest dates April and October 15th, par value $200,000.00 (coupons) numbers

F00190566;
J00090739;
B00010452/F56;
D00223644;
C00232273/H78;
A00225521/C23;
F00225526/H28
@ $10,000.00 each,

such bonds having been deposited by it, pursuant to authority conferred by Section 1029 of the Revenue Act of 1924, approved June 2, 1924, and subject to the provisions thereof and of Treasury Department Circular No. 154, dated May 15, 1922, as security for the faithful performance of any and all of the conditions or stipulations of a certain obligation entered into by it with the United States, under

date of April 3, 1925, which is hereby made a part hereof, and the undersigned agrees that, in case of any default in the performance of any of the conditions and stipulations of such undertaking, its said attorney shall have full power to collect said bonds or any part thereof, or to sell, assign, and transfer said bonds or any part thereof without notice, at public or private sale, free from any equity of redemption and without appraisement or valuation, notice and right to redeem being waived, and to apply the proceeds of such sale or collection, in whole or in part, to the satisfaction of any damages, demands, or deficiency arising by rea- [fol. 12] son of such default, as its said attorney may deem best."

And said defendant, by said deed, for itself, successors and assigns, ratified and confirmed whatever its attorney should do by virtue thereof.

A copy of said writing obligatory and instrument of pledge with the said deed of power of attorney thereto attached is hereto annexed, made a part hereof the same as if fully rewritten herein, and marked "Exhibit B".

VIII

That, upon the delivery of the said writing obligatory and instrument of pledge and the said United States Bonds therein mentioned as aforesaid and the said power of attorney, induced thereby and in reliance thereon, plaintiff through its said Collector of Internal Revenue, relieved the American Surety Company of its liability hereinbefore set forth and continued to refrain from the collection of the said taxes assessed as aforesaid against said Gulf States Steel Company. Plaintiff received nothing by reason of the aforesaid writing obligatory and instrument of pledge and on, to-wit, September 9, 1925, the said assessment of tax hereinbefore set forth then remaining unpaid and unsatisfied and said claim for the abatement thereof being then still pending before the Commissioner of Internal Revenue and undetermined by him, in consideration that plaintiff, through its said Collector as aforesaid, release and surrender the United States Liberty Bonds in the afore- [fol. 13] said instrument described and by the provisions thereof deposited with the said Collector, at Birmingham, Jefferson County, State of Alabama, in the Southern Divi-

sion of the Northern Judicial District of Alabama, the said Defendant, Gulf States Steel Company, as principal and the defendant, National Surety Company, as surety, delivered to W. E. Snead, as Collector of Internal Revenue, District of Alabama, their certain writing obligatory, hereinafter called "bond", duly executed with the respective corporate signatures of the said defendants thereto subscribed and the respective corporate seals of the said defendants thereto affixed, whereby they acknowledge themselves, and each of them, their successors, heirs, executors and administrators, jointly and severally, to be firmly held and bound unto said W. E. Snead, as Collector as aforesaid, for the payment well and truly to be made to him of Two Hundred Thousand Dollars ($200,000.00).

Said bond had, and has, a condition therein written in words, figures and symbols, to-wit:

"The condition of the above obligation is such that, whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with the Collector of Internal Revenue for the District of Alabama [fol. 14] at Birmingham. On the third day of April, 1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties and interest as is not abated. In lieu of surety on the above bond the said Company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following described United States, Fourth Liberty Loan 4¼% Gold Bonds of 1933-8 series, being of the par value of $200,000.00 (coupons), numbers

F00190566;
J00090739;
B00010452/F56;
D00223644;
C00232273/H78;
A00225521/C23;
F00225526/H28
@ $10,000.00 each.

The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Alabama. Now therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by law, then this obligation shall be of no effect. Otherwise it shall remain in full force."

[fol. 15] A copy of said bond is hereto attached, made a part hereof, the same as if fully rewritten herein, and marked "Exhibit C".

IX

That, upon the delivery of the said bond duly executed, as aforesaid, by the defendants, induced thereby and in reliance thereon, plaintiff through its said Collector of Internal Revenue, released and surrendered to the said Gulf States Steel Company the United States Liberty Bonds theretofore deposited as a pledge with the said Collector as aforesaid and continued to refrain from the collection of the said tax, assessed as hereinbefore set forth, pending the determination of the said claim for the abatement thereof, and thereafter, to-wit, December 4, 1925, the Commissioner of Internal Revenue duly considered said claim and found that the said Gulf States Steel Company was liable for a tax for the year 1917 in excess of the amount previously assessed and thereupon, on said date, by mail, notified it that he would reject the said claim and would so officially notify the Collector at the expiration of thirty days from the date of the said notice unless prior thereto evidence should be submitted showing the adjustment to be incorrect, and, thereafter, on, to-wit, May 12, 1926, the Commissioner of Internal Revenue further considered said claim, and no sufficient evidence having been submitted to indicate error in the adjustment set forth in the letter of December 4, 1925, thereupon rejected the same for the full amount thereof, whereby there remained unpaid and un-

[fol. 16] abated of the said assessment One Hundred Fifty-three Thousand, Eight Hundred Fifteen Dollars and Thirty Cents ($153,815.30), which said finding and determination of the Commissioner of Internal Revenue rejecting said claim for abatement has remained and now is in full force,

vigor and effect, unvacated, unreversed and unmodified and is subject to no credits, set-offs or counterclaims other than hereinafter set forth.

X

That heretofore the said Gulf States Steel Company became entitled to credit as follows: by reason of overpayment of taxes to the plaintiff for the year 1918 in the amount Seven Thousand Ninety-eight Dollars and Twenty-one Cents ($7,098.21); by reason of overpayment of taxes to the plaintiff for the year 1922 in the amount Eleven Thousand Five Hundred Four Dollars and Twenty-two Cents ($11,504.22); by reason of overpayment of taxes to the plaintiff for the year 1923 in the amount Two Thousand Four Hundred Seventeen Dollars and Thirty Cents ($2,417.30), a total of Twenty-one Thousand Nineteen Dollars and Seventy-three Cents ($21,019.73), which credits being applied to the aforesaid assessment left unpaid, unabated and unsatisfied thereof the amount One Hundred Thirty-two Thousand, Seven Hundred Ninety-five Dollars and Fifty-seven Cents ($132,795.57).

[fol. 17]

XI

That on or about July 11, 1930, before the bringing of this action, the said Collector of Internal Revenue for the District of Alabama served notice upon the said defendants of the action of the Commissioner with respect to said claim in abatement, of the amount of said tax not abated by reason *af* said action, of the credits allowed on said assessment, and made demand for the payment of said sum One Hundred Thirty-two Thousand, Seven Hundred Ninety-five Dollars and Fifty-seven Cents ($132,795.57), together with six per cent (6%) per annum from April 2, 1921, to the extent of the amount stipulated in the said bond, namely, Two Hundred Thousand Dollars ($200,000.00). Nothwithstanding said notice and demand, the defendants and each of them have at all times wholly failed, neglected and refused to pay said amount and/or any part thereof, and do so continue to fail, neglect and refuse.

XII

That by reason of the premises, plaintiff has done and performed all the matters and things of it required to be

done or performed under the provisions and stipulations of the said bond and the defendants have failed, neglected and refused to do and perform the things therein of them required to be done, whereby they have breached the condition of said bond and the promise thereof has become and now is absolute and plaintiff has a right to have and demand [fol. 18] of them and each of them Two Hundred Thousand Dollars ($200,000.00), its damages sustained, and which amount with interest from July 11, 1930, is justly due and owing to plaintiff from the defendants, and which they jointly and severally promised to pay, but, notwithstanding said promise, and, although demand has often been made of them therefor, they, and each of them, have at all times failed, neglected and refused to pay.

Wherefore plaintiff prays judgment against the defendants and each of them in the amount Two Hundred Thousand Dollars ($200,000.00) with interest from July 11, 1930, and costs herein.

C. B. Kennamer, United States Attorney.

[fol. 19] *Duly sworn to by Charles B. Kennamer. Jurat omitted in printing.*

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[fol. 20] EXHIBIT "A" TO COMPLAINT

UNITED STATES OF AMERICA

STATE OF ALABAMA,
County of Jefferson:

We, Gulf States Steel Company, a Corporation, organized under the laws of the State of Delaware, as principal, and the American Surety Company of New York, a corporation organized under the laws of the State of New York, and duly qualified to transact business in the State of Alabama, as surety, are held and firmly bound unto W. E. Snead, as Collector of Internal Revenue, District of Alabama, in the penal sum of One Hundred and Seventy-five Thousand Three Hundred and Fifty Dollars ($175,350.00), for the payment of which well and truly to be made, we, and each of us, bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this the 13th day of March, 1923.

The condition of the above obligation is such that, if the said Gulf States Steel Company will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and expense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand Eight Hundred Fifteen and 30/100 Dollars ($153,815.30), claimed of it under the War Revenue Act of 1917, pending the filing, by the said Gulf States Steel [fol. 21] Company of additional facts and information in support of a claim for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect.

Gulf States Steel Company, by A. R. Forsyth, Vice-President. Attest: W. H. Moore, Secretary. (Seal.) American Surety Company of New York, By Frank L. Jones, Resident Vice-President. Attest: William B. White, Resident Secretary. (Seal.)

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[fol. 22] EXHIBIT "B-1" TO COMPLAINT

Know all men by these presents, that, the Gulf States Steel Company, of the City of Birmingham, and State of Alabama, as obligor, is held and firmly bound unto W. E. Snead, Collector, in the penal sum of Two Hundred Thousand Dollars ($200,000.00), lawful money of the United States, for the payment of which sum, well and truly to be made to W. E. Snead, Col., without relief from valuation or appraisement laws, the Gulf States Steel Company binds itself, its successors, and assigns, firmly by these presents.

The condition of the above obligation is such that, whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand, Three Hundred and Fifty Dollars ($175,350.00), and in favor of W. E. Snead, Collector of Internal Revenue, for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March, 1923, and was given in support of a claim for the abatement of assessments, penalties and interests, under the Revenue Act of 1917.

Being desirous of relieving the above bound surety Company and further securing the payment of any amount found to be due the United States government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, [fol. 23] interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect.

The above-bounden obligor, in order the more fully to secure W. E. Snead, Collector in the payment of the aforementioned sum, hereby pledges as security therefor bonds of the United States in the principal sum of Two Hundred Thousand Dollars ($200,000.00), which said bonds are in the following numbers and amounts, and are otherwise more particularly described as follows:

United States, Fourth Liberty Loan 4¼% Gold Bonds of 1933-8, interest dates April and October 15th, par value $200,000.00 (coupons), numbers

F00190566;
J00090739;
B00010452/F56;
D00223644;
C00232273/H78;
A00225521/C23;
F00225526/H28
@ $10,000.00 each,

which said bonds were deposited with Federal Reserve Bank of New York on March 24, 1925, for the account of W. E. Snead, Collector of Internal Revenue, for the District of Alabama.

[fol. 24] Contemporaneously herewith the undersigned has also executed and delivered a power of attorney and agreement in favor of W. E. Snead, Collector, authorizing and empowering said officer as such attorney to collect or sell the above described bonds so deposited, or any part thereof, in case of any default in the performance of any of the above mentioned conditions or stipulations.

In witness whereof this Corporation has caused this instrument to be signed by its Assistant Secretary and its

Corporate Seal to be hereunto duly affixed by order of its Executive Committee, this 3rd day of April, 1925.

Gulf States Steel Company, by Calvert Brewer, Assistant Secretary. (Seal.)

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[fol. 25] EXHIBIT "B-3" TO COMPLAINT

Know all men by these presents, that the Gulf States Steel Company, a Corporation duly incorporated under the laws of the State of Delaware, and having its principal office in the City of Birmingham, State of Alabama, in pursuance of a resolution of the Executive Committee of said Corporation, passed on the 11th day of March, 1925, a duly certified copy of which resolution is hereto attached, does hereby constitute and appoint W. E. Snead, Collector, and his successors in office, as attorney for said Corporation, for and in the name of said Corporation to collect or to sell, assign and transfer certain United States Liberty Bonds, described as follows:

"United States Fourth Liberty Loan 4¼% Gold Bonds of 1933-8, interest dates April and October 15th, par value $200,000.00 (coupons), numbers

F00190566;
J00090739;
B00010452/F56;
D00223644;
C00232273/H78;
A00225521/C23;
F00225526/H28
@ $10,000.00 each,

such bonds having been deposited by it, pursuant to authority conferred by Section 1029 of the Revenue Act of 1924, approved June 2, 1924, and subject to the provisions thereof and of Treasury Department Circular No. 154, [fol. 26] dated May 15, 1922, as security for the faithful performance of any and all of the conditions or stipulations of a certain obligation entered into by it with the United States, under date of April 3, 1925, which is hereby made a part hereof, and the undersigned agrees that, in case of any default in the performance of any of the conditions

and stipulations of such undertaking, its said Attorney shall have full power to collect said bonds or any part thereof, or to sell, assign, and transfer said bonds or any part thereof without notice, at public or private sale, free from any equity of redemption and without appraisement or valuation, notice and right to redeem being waived, and to apply the proceeds of such sale or collection, in whole or in part, to the satisfaction of any damages, demands, or deficiency arising by reason of such default, as its said attorney may deem best."

And said Corporation hereby, for itself, its successors and assigns, ratifies and confirms whatever its said Attorney shall do by virtue of these presents.

In witness whereof the Gulf States Company, the Corporation hereinafter named, by Calvert Brewer, duly authorized to act in the premises, has executed this instrument and caused the seal of the Corporation to be hereto affixed this the 3rd day of April, 1925.

Gulf States Steel Company, by Calvert Brewer, Assistant Secretary. (Seal.)

[fol. 27] STATE OF NEW YORK,
County of New York, ss:

Before me, the undersigned, a Notary Public within and for the County of New York, in the State of New York, personally appeared Calvert Brewer, and for and in behalf of said Gulf States Steel Corporation, acknowledged the execution of the foregoing power of attorney.

Witness my hand and Notarial Seal this the 3rd day of April, 1925.

D. J. Wittman, Notary Public. Notary Public, Kings County. Kings Co. Clerk's No. 296. Kings Co. Register's No. 7056. New York Co. Clerk's No. 121. New York Register's No. 7185. Commission expires March 30, 1927. (Seal.)

(Exhibit B-4.)

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[fol. 28] EXHIBIT "B-5" TO COMPLAINT

Resolved, that Calvert Brewer, the Assistant Secretary of this Company, be and he hereby is authorized and in-

structed to deposit with the Federal Reserve Bank of New York, U. S. Liberty Loan Bonds owned by this Company, of the par value of Two Hundred Thousand Dollars ($200,000) and to authorize, empower and direct the said Federal Reserve Bank of New York to hold said bonds for the benefit of the Collector of Internal Revenue of the District of Alabama, to assure him of the payment by the duly authorized officers of this Company of such taxes, interest and penalties as may be demanded from this Company should the claim filed by this Company for the abatement of an additional income and excess profits tax assessment of $153,815.30 for the year 1917 be denied in whole or in part and to deliver said Bonds to said Collector of Internal Revenue upon demand of said Collector of Internal Revenue provided default be made by this Company in whole or in part in payment of such taxes, interest and penalties, and be it

Further resolved, that the said Calvert Brewer, as Assistant Secretary of this Company, be and he hereby is authorized and instructed to enter into an agreement with the Collector of Internal Revenue of the District of Alabama for the payment by this Company of any Federal Income and Excess Profits Taxes that may finally be determined to be due from this Company for the year 1917, to notify the Collector of Internal Revenue of the District of Alabama of the deposit of the U. S. Liberty Loan Bonds in accordance with the authority hereby given, and to [fol. 29] authorize the Collector of Internal Revenue of the District of Alabama to sell said U. S. Liberty Loan Bonds at public or private sale at the market price prevailing on the day of sale in the event that said bonds are delivered to the said Collector of Internal Revenue of the District of Alabama upon default of this Company in making payment of any such taxes that may finally be determined to be due for the year 1917, and be it

Further resolved, that the said Calvert Brewer, as Assistant Secretary of this Company, be and he hereby is authorized and directed to do any and all things necessary and proper to fully and effectively carry out the instructions hereby given.

I hereby certify that the foregoing is a true and correct copy of resolutions adopted by the Executive Committee

of the Board of Directors of Gulf States Steel Company at a meeting held March 11, 1925, at which a quorum was present.

Calvert Brewer, Assistant Secretary.

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[fol. 30] EXHIBIT "C-1" TO COMPLAINT

Surety Bond

Bonding Company Form

UNITED STATES OF AMERICA

STATE OF ALABAMA,
County of Jefferson:

We, Gulf States Steel Company, as principal, and National Surety Company, a Corporation organized under the laws of the State of New York, and duly qualified to transact business in the State of Alabama, as surety are held and firmly bound unto W. E. Snead, as Collector of Internal Revenue, District of Alabama, in the penal sum of Two Hundred Thousand Dollars, ($200,000.00), for the payment of which well and truly to be made, we and each of us, bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this the 9th day of September, 1925.

The condition of the above obligation is such that, whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with [fol. 31] the Collector of Internal Revenue for the District of Alabama at Birmingham. On the third day of April, 1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties and interest as is not abated. In lieu of surety on the above bond the said company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following described

United States, Fourth Liberty Loan 4¼% Gold Bonds of 1933-8 series, being of the par value of $200,000.00 (coupons), numbers

F00190566;
J00090739;
B00010452/F56;
D00223644;
C00232273/H78;
A00225521/C23;
F00225526/H28
@ $10,000.00 each.

The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Alabama. Now, therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to the said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by Law, then this obligation shall be of no effect. Otherwise it shall remain in full force.

[fol. 32] Gulf States Steel Company, by A. R. Forsyth, Principal Vice-President. (L. S.) National Surety Company, Surety, by T. A. White, Resident Vice-President. (L. S.) By W. Ewing, Surety, Resident Assist. Sec'ty. (L. S.)

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[fol. 33] EXHIBIT "C-2" TO COMPLAINT

National Surety Company

Capital: $10,000,000

Certificate of Appointment of Resident Vice-President

Know all men by these presents that T. A. White has been and is hereby appointed Resident Vice-President of the National Surety Company, at Birmingham, Alabama, and as such Resident Vice-President has full power and authority to sign and execute on behalf of the Company any and all bonds, and all bonds signed by him, when sealed

and attested by the Secretary, an Assistant Secretary, or a Resident Assistant Secretary, shall be valid and binding upon the Company as if said bonds had been signed by the President and duly sealed and attested.

Said appointment is made under and by authority of the following By-law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the second day of February, 1909:

"Article XII. Resident Officers and Attorneys-in-Fact

"Section 1. The President, First Vice-President and any other Vice-President may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries and [fol. 34] Attorneys-in-Fact to represent and act for and on behalf of the Company, and either the President, First Vice-President or any other Vice-President, the Board of Directors or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and the authority given him.

"Sec. 2. Resident Vice-Presidents—Resident Vice-Presidents shall have power and authority to sign and execute on behalf of the Company any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and to bind the Company thereby as fully and to the same extent as the President could bind it."

In witness whereof the National Surety Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 5th day of December, A. D., 1921.

National Surety Company, by J. L. Mee, Vice-President. Attest: M. Crooke, Assistant Secretary. (Corporate Seal.)

[fol. 35] State of New York,
County of New York, ss:

On this 5th day of December, A. D. 1921, before me personally came J. L. Mee, to me known, who, being by me duly sworn, did depose and say, that he resides in the City

of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the Seal of the said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

E. M. Miller, Notary Public. (Notarial Seal.)

STATE OF NEW YORK,
County of New York, ss:

I, M. E. Murray, Resident Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of an instrument executed by said National Surety Company which is still in full force and effect.

In witness whereof I have hereunto set my hand and affixed the seal of said Company, at the City of New York, [fol. 36] this 1st day of May, A. D. 1925.

M. E. Murray, Resident Assistant Secretary.

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EXHIBIT "C-3" TO COMPLAINT

National Surety Company

Certificate of Appointment of Resident Assistant Secretary

Know all men by these presents that N. Ewing has been and is hereby appointed Resident Assistant Secretary of the National Surety Company, at Birmingham, Alabama, and as such Resident Assistant Secretary has power and authority to seal and attest on behalf of the Company any and all bonds and all bonds sealed and attested by him, when signed by the President, a Vice-President, or a Resident Vice-President, shall be as valid and binding upon the Company as if said bonds had been sealed and attested by the Secretary.

Said appointment is made under and by authority of the following By-Law adopted by the Board of Directors of the National Surety Company at the meeting duly called and held on the second day of February, 1909:

"Article XII. Resident Officers and Attorneys-in-Fact

[fol. 37] "Section 1. The President, First Vice-President or any other Vice-President may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Company, and either the President, First Vice-President or any other Vice-President, the Board of Directors or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and the authority given him.

Sec. 3. Resident Assistant Secretaries.—Resident Assistant Secretaries shall have power and authority to affix the seal of the Company to and attest, on behalf of the Company, any and all bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature thereof and to bind the Company thereby as fully and to the same extent as the Secretary could bind it."

In witness whereof the National Surety Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 29th day of April, A. D., 1925.

National Surety Company, by J. L. Mee, Vice-President. Attest: M. Crooke, Assistant Secretary. (Corporate Seal.)

[fol. 38] STATE OF NEW YORK,
County of New York, ss:

On this 29th day of April, A. D., 1925, before me personally came J. L. Mee, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

M. M. Miller, Notary Pubilc. (Notarial Seal.)

State of New York,
County of New York, ss:

I, M. E. Murray, Resident Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of an instrument executed by said National Surety Company which is still in full force and effect.

In witness whereof I have hereunto set my hand and affixed the seal of said Company, at the City of New York, [fol. 39] this 29th day of April, A. D., 1925.

M. E. Murray, Resident Assistant Secretary.

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In United States District Court

[Title omitted]

Demurrer of Gulf States Steel Company—Filed October 20, 1930

Comes the defendant Gulf States Steel Company, and demurs to the complaint, because:

[fol. 40] 1. For aught that appears, the tax sought to be recovered in this case was abated by the order of the United States Board of Tax Appeals.

2. For aught that appears from the complaint, the tax sought to be recovered was abated other than by the ruling of the Commissioner of Internal Revenue.

3. It appears from the terms of the bond sued on that any cause of action on the bond is in W. E. Snead, Collector of Internal Revenue, and not in the plaintiff.

4. It affirmatively appears that the recovery of the tax sued for is barred by the limitation provided for in Section 1109 (a) (1) of the Revenue Act of 1926.

Benners, Burr, McKamy & Forman, Attorneys for Defendant Gulf States Steel Company.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER OF NATIONAL SURETY COMPANY—Filed October 20, 1930

Comes the defendant, National Surety Company, and demurs to the complaint because:

1. For aught that appears, the tax sought to be recovered in this case was abated by the order of the United States Board of Tax Appeals.

2. For aught that appears from the complaint, the tax sought to be recovered was abated other than by the ruling of the Commissioner of Internal Revenue.

[fol. 42] 3. It appears from the terms of the bond sued on that any cause of action on the bond is in W. E. Snead, Collector of Internal Revenue, and not in the plaintiff.

4. It affirmatively appears that the recovery of the tax sued for is barred by the limitation provided for in Section 1109 (a) (1) of the Revenue Act of 1926.

Benners, Burr, McKamy & Forman, Attorneys for Defendant National Surety Company.

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IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEAS OF GULF STATES STEEL COMPANY—Filed February 26, 1931

[fol. 43] Comes the defendant Gulf States Steel Company and for answer to the complaint exhibited against it by the United States of America in the above styled case, separately and severally, says:

1. The allegations of the complaint are not true.

2. For further answer to the complaint, this defendant says that it filed its income and excess profits tax returns for the calendar year 1917 with the Collector of Internal

Revenue for the District of Alabama on, to-wit, March 28, 1918 and that the returns showed a tax due of Nine Hundred Eighty-nine Thousand Seven Hundred Ninety and 57/100 ($989,790.57) Dollars, which it duly paid on June 25, 1918. Thereafter, the Commissioner of Internal Revenue examined such returns and tentatively determined a deficiency in the taxes reported in said returns of One Hundred Fifty-three Thousand Eight Hundred Fifteen and 30/100 ($153,815.30) Dollars, and in April, 1921, assessed the amount of such deficiency against this defendant. On or about May 6, 1921, this defendant duly filed a claim for the abatement of such additional assessment. On or about September 9, 1925, the claim for abatement not having been disposed of, the defendant Gulf States Steel Company, as principal, and the defendant National Surety Company, as surety, delivered to W. E. Snead as Collector of Internal Revenue for the District of Alabama, a bond of which the [fol. 44] writing attached to the complaint as "Exhibit C" is a copy. Said bond provided among other things that, "if the principal or sureties, either or both, shall pay to said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon, as provided by law, then this obligation shall be of no effect." That on, to-wit, May 12, 1926, the Commissioner of Internal Revenue finally determined the deficiency in the amount assessed and rejected this defendant's claim for abatement. From said final determination by the Commissioner of Internal Revenue of such deficiency, this defendant appealed by petition in the form and manner provided by law to United States Board of Tax Appeals, to which jurisdiction in the premises duly appertained. The Commissioner of Internal Revenue answered said petition and the appeal was duly heard and considered by said United States Board of Tax Appeals. Thereafter on, to-wit, July 10, 1928, the said United States Board of Tax Appeals handed down its decision that "there is no deficiency for the year 1917" and pursuant thereto and on or about October 28, 1928, entered its order reversing the determination of the Commissioner of Internal Revenue and abating the deficiency of One Hundred Fifty-three Thousand Eight Hundred Fifteen and 30/100 ($153,815.30) Dollars which had been assessed by the Commissioner of Internal Revenue.

Thereafter, to-wit, April 9, 1929, the Commissioner of Internal Revenue filed his petition for review of said decision of said United States Board of Tax Appeals abating the [fol. 45] tax to the United States Circuit Court of Appeals for the Fifth Circuit. Thereafter on, to-wit, December 3, 1929, United States Circuit Court of Appeals for the Fifth Circuit made and entered its order, upon the motion of the Commissioner of Internal Revenue, dismissing said petition for review and thereupon the order of the United States Board of Tax Appeals abating the assessment of One Hundred Fifty-three Thousand Eight Hundred Fifteen and 30/100 ($153,815.30) Dollars became final. Said decision and order of the United States Board of Tax Appeals and of said Circuit Court of Appeals remains unaltered, unamended and unreversed.

3. For further answer to complaint, this defendant says that it made due return of its income and profits taxes for the calendar year 1917 within the time provided by law and thereafter duly paid to the Collector of Internal Revenue for the District of Alabama, in which said return was made, within the time required by law the full amount of income and profits taxes properly assessable to and payable by it for said year.

John W. Drye, Jr., Benners, Burr, McKamy & Forman, Attorneys for Defendant Gulf States Steel Company.

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[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEAS OF NATIONAL SURETY COMPANY—Filed February 26, 1931

Comes the defendant National Surety Company, and for answer to the complaint exhibited against it by the United States of America in the above styled case, separately and severally, says:

1. The allegations of the complaint are not true.

2. For further answer to the complaint, this defendant says that Gulf States Steel Company filed its income and excess profits tax returns for the calendar year 1917 with

the Collector of Internal Revenue for the District of Ala- [fol. 47] bama on, to-wit, March 28, 1918, and that the returns showed a tax due of Nine Hundred Eighty-nine Thousand Seven Hundred Ninety and 57/100 ($989,790.57) Dollars, which it duly paid on June 25, 1918. Thereafter, the Commissioner of Internal Revenue examined such returns and tentatively determined a deficiency in the taxes reported in said returns of One Hundred Fifty-three Thousand Eight Hundred Fifteen and 30/100 ($153,815.30) Dollars, and in April, 1921, assessed the amount of such deficiency against defendant Gulf States Steel Company. On or about May 6, 1921, defendant Gulf States Steel Company filed a claim for the abatement of such additional assessment. On or about September 9, 1925, the claim for abatement not having been disposed of, the defendant Gulf States Steel Company, as principal, and the defendant National Surety Company, as surety, delivered to W. E. Snead as Collector of Internal Revenue for the District of Alabama, a bond of which the writing attached to the complaint as "Exhibit C" is a copy. Said bond provided, among other things, that "if the principal or sureties, either or both, shall pay to said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon, as provided by law, then this obligation shall be of no effect." That on, to-wit, May 12, 1926, the Commissioner of Internal Revenue finally determined the deficiency in the amount assessed and rejected this claim for abatement of defendant Gulf States Steel Company. From said determination by the Commissioner of Internal Revenue of such deficiency, defendant Gulf States Steel Company appealed by petition [fol. 48] in the form and manner provided by law to United States Board of Tax Appeals, to which jurisdiction in the premises duly appertained. The Commissioner of Internal Revenue answered said petition and the appeal was duly heard and considered by said United States Board of Tax Appeals. Thereafter on, to-wit, July 10, 1928, the said United States Board of Tax Appeals handed down its decision that "there is no deficiency for the year 1917" and pursuant thereto and on or about October 28, 1928, entered its order reversing the determination of the Commissioner of Internal Revenue and abating the deficiency of One Hundred Fifty-three Thousand Eight Hundred Fifteen and

30/100 ($153,815.30) Dollars which had been assessed by the Commissioner of Internal Revenue. Thereafter on, to-wit, April 9, 1929, the Commissioner of Internal Revenue filed his petition for review of said decision of said United States Board of Tax Appeals abating the tax to the United States Circuit Court of Appeals for the Fifth Circuit. Thereafter on, to-wit, December 3, 1929, United States Circuit Court of Appeals for the Fifth Circuit made and entered its order, upon the motion of the Commissioner of Internal Revenue, dismissing said petition for review and thereupon the order of the United States Board of Tax Appeals abating the assessment of One Hundred Fifty-three Thousand Eight Hundred Fifteen and 30/100 ($153,815.30) Dollars became final. Said decision and order of the United States Board of Tax Appeals and of said Circuit Court of Appeals remains unaltered, unamended and unreversed.

[fol. 49] 3. For further answer to complaint, this defendant says that Gulf States Steel Company made due return of its income and profits taxes for the calendar year 1917 within the time provided by law and thereafter duly paid to the Collector of Internal Revenue for the District of Alabama, in which said return was made, within the time required by law the full amount of income and profits taxes properly assessable to and payable by it for said year.

John W. Drye, Jr., Benners, Burr, McKamy & Forman, Attorneys for Defendant National Surety Company.

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[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER OF UNITED STATES TO PLEA OF GULF STATES STEEL COMPANY—Filed February 26, 1931

Comes United States of America, plaintiff in the above entitled cause, and demurs to plea two (2) filed herein by Gulf States Steel Company, a Corporation, and assigns the following grounds thereof:

1. For that the matters alleged in said plea do not constitute a defense to this action.

C. B. Kennamer, United States Attorney.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER OF UNITED STATES TO PLEA NO. 2 OF NATIONAL SURETY COMPANY—Filed Feb. 26, 1931

Comes United States of America, plaintiff in the above entitled cause, and demurs to plea two (2) filed herein by National Surety Company, a Corporation, and assigns the following grounds thereof:

1. For that the matters alleged in said plea do not constitute a defense to this action.

C. B. Kennamer, United States Attorney.

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[fol. 52] IN UNITED STATES DISTRICT COURT

No. 3723

UNITED STATES OF AMERICA, Plaintiff,

vs.

GULF STATES STEEL COMPANY, a Corporation, and NATIONAL SURETY COMPANY, a Corporation, Defendants

JUDGMENT—Filed May 1, 1931

This cause coming on to be heard this day, come the parties herein by counsel, and defendants withdraw demurrer heretofore filed to plaintiff's complaint.

Thereupon defendant, Gulf States Steel Company, a Corporation, filed its pleas numbered 1, 2 and 3, and Defendant, National Surety Company, a Corporation, filed its pleas numbered 1, 2 and 3.

[fol. 53] Thereupon the plaintiff filed its demurrer to plea numbered 2 filed by defendant, Gulf States Steel Company, a Corporation, and plaintiff filed its demurrer to plea numbered 2 filed by defendant, National Surety Company, a Corporation, which said demurrers being heard, considered and understood by the Court, it is ordered, adjudged and decreed by the Court that said demurrers be and they are hereby sustained.

Thereupon issue was joined on plaintiff's complaint and pleas numbered 1 and 3 filed by each defendant.

Thereupon to try this cause came a jury of good and lawful men, to-wit, J. M. Ellis, Foreman, and eleven others, duly impaneled, charged and sworn to try this cause, who upon their oaths do say:

"We, the jury, find for the plaintiff and assess its damages at $209,999.98.

J. M. Ellis, Foreman."

Thereupon it is ordered, adjudged and decreed by the Court that the plaintiff have and recover of and from the defendants, Gulf States Steel Company, a Corporation, and National Surety Company, a Corporation, the sum of $209,999.98, together with all costs in this behalf expended, for which execution may issue.

Done this May 1, 1931.

W. I. Grubb, United States District Judge.

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[fol. 54] In United States District Court for the Southern Division of the Northern District of Alabama

No. 3723

United States of America, Plaintiff,

vs.

Gulf States Steel Company and National Surety Company, Defendants

**Bill of Exceptions**—Filed June 29, 1931

Caption

Be it remembered that on the trial of this case before the Honorable William I. Grubb, District Judge, and a jury, the following proceedings not otherwise appearing of record, were had, to-wit:

The averments of paragraphs one and two of the complaint were admitted to be true. The averments of para-

graph three of the complaint to the effect that W. E. Snead was and is the duly appointed, qualified and acting United States Internal Revenue Collector for the Internal Revenue District of Alabama and the averments of paragraph eleven to the effect that demands therein set forth were made [fol. 55] and that defendants had wholly failed, neglected and refused to pay the amount set forth in said paragraph or any part thereof, were likewise admitted.

The plaintiff offered in evidence a certified copy of the corporation income and corporation excess profits tax returns for 1917 (with schedules attached to former return and schedules and statements attached to latter return), executed March 27, 1918, filed by Gulf States Steel Company, Birmingham, Alabama, certified copies of assessment certificate and that portion of the March, 1918, Income Tax Assessment List—Alabama Collection District—showing an assessment of $989,790.57, against Gulf States Steel Company, Birmingham, Alabama, for the year 1917.

The plaintiff offered in evidence certified copy of Assessment Certificate and that portion of the April, 1921, Income Tax Assessment List—Alabama Collection District—showing an additional assessment of $153,815.30 for 1917, against Gulf States Steel Company, Birmingham, Alabama. This document in full is as follows:

OFFER IN EVIDENCE

Treasury Department, United States Internal Revenue. Form 23C—Revised January, 1920.

Internal Revenue Bureau, Office of the Deputy Commissioner—Accounts

April 26, 1921.

[fol. 56] Assessment Certificate

District—Alabama.
Month—April.
Year—1921.
Additional Assessments, Income Tax Division.
——— ———, Chief of Division.
——— ———, Bookkeeper.

Tax and payments compared and found to agree with sectional control ledgers.

I hereby certify that the individuals, firms and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names and that the amounts thereof are as follows: ——.

Dated at —— —, 192-.

Office of Collector of Internal Revenue.

—— ——, Collector of Internal Revenue.

List ——.

Returns Filed ——.

Excess Collections: ——.

Revisions: ——.

Total Tax: ——.

[fol. 57] Totals reported by Collector: ——.

Differences found by Commissioner: ——.

Items reported by commissioner: $253,663.60.

Total Assessment: $253,663.60.

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due from the individuals, firms and corporations opposite whose names such amounts are placed and that the amount chargeable to the collector is as above.

Dated at Washington, D. C., April 26, 1921.

Office of Commissioner of Internal Revenue.

W. T. West, Acting Commissioner of Internal Revenue.

## Instructions

This form must be made each month in triplicate for each tax division. Two of the three copies with the duplicate copies of the current supplemental and monthly lists (Form 23 A) will be forwarded to the Commissioner as soon as completed and verified, one copy of this certificate (Form 23 C) will be returned to the collector accompanied by a statement of differences on Form 23 D (if errors are found) [fol. 58] and by supplemental sheets on Form 23 A contain-

ing items reported originally by the Commissioner. When there are revisions which affect the total tax of any account on prior lists, supplemental lists (Form 23 A) showing the detail of such revisions must be submitted.

2—9578

Treasury Department, Internal Revenue Service. Form 23 A.—Revised Jan. 1920.

Page No. 11

Assessment List

2—8654

District: Alabama.
Income Tax (Classification).
List: April, 1921.
Old Balance: ——.
Date: ——.
Debit: ——.
Credit: ——.
New Balance: ——.
Remarks: ——.

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[fol. 59] Gulf States Steel Co., Birmingham, Ala., new Balance $153,815.30.—1917—61750281—O A 4-421. 8.
Remarks: ——.

Apr 118.

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| 9 | |

The plaintiff offered in evidence certified copy of Claim for Abatement of $153,815.30, additional income and profits tax for 1917, filed by Gulf States Steel Company, Birmingham, Alabama; copy of letter dated December 4, 1925, to Gulf States Steel Company, Birmingham, Alabama, from C. R. Nash, Assistant to the Commissioner. This document in full is as follows:

OFFER IN EVIDENCE

Treasury Department, U. S. Internal Revenue. Form 47.—Revised April, 1918. Ed. 300,000.

Claim for Abatement

Taxes Erroneously or Illegally Assessed

Stamped at top of page: Date of filing to be plainly stamped. Received May 6, 1921. Dist. of Alabama.
[fol. 60] U. S. Board of Tax Appeals, Div. —, Docket 9246, etc.
Marked for Identification May 19, 1927.
Petitioner: —— ——.
Respondent: —— ——.

Exhibit B.

U. S. Board of Tax Appeals, Div. —, Docket 9246, etc.
Admitted as evidence May 19, 1927.
Petitioners: —— ——.
Respondents: —— ——.

Exhibit B.

STATE OF ALABAMA,
County of Jefferson, ss:

Important.—This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.

Write name so it can be easily read.

Name of Claimant: Gulf States Steel Company.
[fol. 61] Address of claimant; give street and number as well as city or town, and state: Brown-Marx Building, Birmingham, Alabama.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant: Mining of ore and manufacturing of steel.

2. Character of assessment or tax: Additional Income Profits Tax for the year 1917.

3. Amount of assessment: $153,815.30.

4. Amount now asked to be abated: $153,815.30.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

That said additional assessment is unwarranted and illegal in so far as it results from a failure to compute the invested capital of claimant by the inclusion therein of the actual cash value on January 1, 1914 of claimant's property in accordance with the provisions of Article 55 of War Excess Profits Tax Regulations No. 41.

[fol. 62] That said additional assessment is unwarranted and illegal in so far as results from the action of the examiners of the officers of the Commissioner of Internal Revenue in allowing as a deduction from income, only 7% of the invested capital, when the facts and circumstances of the organization of claimant warrant the allowance of a deduction from income of an amount equal to 8% of the invested capital.

That said additional assessment is unwarranted and illegal in so far as it results from disallowance as a part of invested capital of certain interest paid by claimant and properly chargeable to property account.

That this affidavit is made by deponent because claimant is a Corporation and deponent is the duly elected Vice-President thereof and is acquainted with the facts.

An oral hearing upon these points is desired.

(Signed) A. R. Forsyth, Vice-President Gulf States Steel Company.

Sworn to and subscribed before me this 6th day of May, 1921. William Davie, (Title:) Notary Public. (Seal.)

[fol. 63] Certificate of Assessment

166,603

I certify that an examination of the records of the Collector's Office shows the following facts as to the assessment and payment of the tax:

Name and Address: Gulf States Steel Company, Birmingham Alabama.

Character of Assessment for Article Taxed: Additional income.

Period Covered by Assessment: 1917.

List: Com.

Year: 1921.

Month: April.

Page: 11.

Line: 8.

Amount: $153,815.30.

John D. McNeel, Collector.

Form 47

Assessment Clerk, Internal Revenue Bureau

Abatement Order: No. 1148.

District: Alabama.

Nature of Tax: Corp., 1917.

Claimant: Gulf States Steel Co.

Address: Birmingham, Ala.

[fol. 64] Examined and submitted for action —— —, 19—.

Amount claimed: $153,815.30.

Amount allowed: $90.12.

Amount rejected: $153,725.18.

Committee on Claims: —— ——.

Claim examined by C. E. L., J. H. L. T. 9-19-25.

Claim approved by A. H. Fay, Chief of Division, Hot. 5-23-22.

Adjusted by Certificate of Overassessment No. 166,603.

Date: 9-18-23.

G. H. G.

Recorded May 11, 1921, Returns Control Section.

Mailed Dec. 4, 1925.
IT:CR:E.
JHLT.

Gulf States Steel Company, Brown-Marx Building, Birmingham, Alabama.

SIRS: Your claim for abatement of $153,815.30, additional income and excess profits tax for 1917, has been reexamined. [fol. 65] The claim is based upon the following points:

(a) That property acquired for stock should be included in invested capital at its value as at January 1, 1914.

(b) The change in the percentage deduction from 8% to 7%.

(c) The disallowance of interest paid as a part of invested capital.

A careful reexamination of the information submitted by you and other data on hand in this office discloses the following:

(a) Article 55 of Regulations 41 provides that tangible property paid in for stock or shares prior to January 1, 1914, must be valued at either (a) the actual cash value of such property on January 1, 1914, or (b) the par value of the stock or shares specially issued therefor, whichever is lower. The par value of the stock issued by you for property is less than the value of the property claimed by you. Therefore, the property received must be included in invested capital at the par value of the stock issued therefor.

(b) The information submitted by you discloses that your company was organized after January 2, 1913, therefore, a rate of 8% is allowed to be used in computing the variable credit for excess profits tax purposes.

[fol. 66] (c) Information at hand indicates that the interest sought to be added to invested capital was claimed as deductions in computing net income for the years 1913 to 1916, inclusive. Your election to charge these items to expense during the years in which incurred constitutes a binding option. An election of this sort which was made concurrently with the transaction cannot now be revised.

Article 64 of Regulations 41 provides that whenever a corporation has claimed and the department has allowed a deduction in respect to its income tax, the item upon which the deduction is based shall not be restored to surplus account nor included in invested capital. Therefore the interest was correctly disallowed as an addition to invested capital.

A tax liability in excess of that previously assessed has been found due, because of the disallowance of $55,987.10, depreciation on stock.

The claim will, therefore, be rejected.

The Collector of Internal Revenue for your district will be officially notified of the adjustment at the expiration of thirty days from the date of this letter unless prior to that date evidence is furnished showing the adjustment is incorrect.

Under no circumstances should payment of the amount rejected be made until a bill is received from the Collector [fol. 67] of Internal Revenue for your district and remittance should then be made to him.

Respectfully, C. R. Nash, Assistant to the Commissioner, by E. B. Robinson, Head of Division.

nlg—6.

The plaintiff offered in evidence certified copy of Bond in the sum of $175,350.00, issued by The American Surety Company of New York, as surety for Gulf States Steel Company, as principal, signed March 13, 1923. This document in full is as set forth as Exhibit "A" annexed to plaintiff's complaint.

The defendants objected to the admission of this bond on the ground that it was immaterial to any issue involved in this litigation. The objection was overruled by the court, to which action the defendants reserved an exception.

The plaintiff offered in evidence certified copy of Bond in the sum of $200,000, between the Gulf States Steel Company of Birmingham, Alabama, obligor and W. E. Snead, Collector of Internal Revenue for the District of Alabama, executed April 3, 1925. This document in full is as set forth as Exhibit "B" annexed to plaintiff's complaint.

[fol. 68] The defendants objected to the admission of this

bond on the ground that it was immaterial to any issue involved in this litigation. The objection was overruled by the court, to which action the defendants reserved an exception.

The plaintiff offered in evidence certified copy of Power of Attorney (with certified copy of resolution attached), running to W. E. Snead, Collector, and his successors in office, from Gulf States Steel Company, Birmingham, Alabama, executed April 3, 1925. This document in full is as set forth in Exhibit "B" annexed to plaintiff's complaint.

The plaintiff offered in evidence certified copy of Bond in the sum of $200,000, issued by National Surety Company, New York, New York, as surety for Gulf States Steel Company, Birmingham, Alabama, as principal signed September 9, 1925. This document in full is as set forth as Exhibit "C" annexed to plaintiff's complaint.

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The plaintiff offered in evidence certified copy of letter dated May 12, 1926 (with statement attached, minus Waiver-Form A mentioned therein), to Gulf States Steel Company, Birmingham, Alabama, from D. H. Blair, Commissioner. This document in full is as follows:

OFFER IN EVIDENCE

(1643M.) Form NP-5

IT:CR:E—60D. JHLT

Mailed May 12, 1926.

[fol. 69] Gulf States Steel Company, Birmingham, Alabama.

SIRS: Your claim for abatement of a deficiency in tax amounting to $153,815.30 assessed against you for the taxable year 1917 has been carefully considered by this office, and it is proposed to allow the said claim for 0.00 and to reject it for $153,815.30, as computed upon the enclosed statement.

In accordance with the provisions of Section 283 (e) or Section 283(k) of the Revenue Act of 1926, you are allowed

60 days (not counting Sunday as the sixtieth day) from the date of mailing of this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C., contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:E:JHLT-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

[fol. 70] Enclosures: Statement, Waiver—Form A

J. H. L. T., 5-6-26.
F. L. H., 5-6-26.
R. C. K., 5-6-26.

Statement of Returns Examined and Resulting Tax Liability

Returns Examined

Corporation: Gulf States Steel Company, Birmingham, Alabama
Year: 1917.
Form: 1031-1103.

Tax Liability

Name: Gulf States Steel Company.
Year: 1917.
Claim in Abatement: $153,815.30.

The adjustments producing the above-stated results were explained in a letter dated December 4, 1925.

The defendants offered in evidence a certified copy of the docket entries, pleadings, testimony, and all documents of record in Docket No. 18358 before the United States Board of Tax Appeals wherein Gulf States Steel Company [fol. 71] was the petitioner and Commissioner of Internal Revenue was the respondent.

This document, with deletions agreed upon by the parties, is as follows:

OFFER IN EVIDENCE

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

GULF STATES STEEL COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

This volume contains certified copies of docket entries, pleadings, testimony, all documents of record.

[Title omitted]

I, Logan Morris, Chairman of the United States Board of Tax Appeals, the same being an independent agency in [fol. 72] the executive branch of the government, do hereby certify that B. D. Gamble is Clerk of said Board and was such Clerk at the time of making and subscribing to the foregoing certificate and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof I do hereby subscribe my name at Washington, D. C., this 21st day of February, 1931.

Logan Morris, Chairman United States Board of Tax Appeals. (Seal.)

cgh.

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BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, do hereby certify that Logan Morris, whose name is subscribed to the foregoing certificate was at the time of subscribing the same Chairman of the United States Board

of Tax Appeals, duly commissioned and qualified and that full faith and credit are due to all his official acts as such. [fol. 73] In testimony whereof I have hereunto set my hand and affixed the seal of said Board at Washington, D. C., this 21st day of February, 1931.

B. D. Gamble, Clerk United States Board of Tax Appeals. (Seal.)

cgh.

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BEFORE UNITED STATES BOARD OF TAX APPEALS

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, hereby certify the foregoing and attached to be true and correct copies of the Docket Entries, Pleadings, Testimony, All Documents of Record, in Docket No. 18358, wherein Gulf States Steel Company is the Petitioner and Commissioner of Internal Revenue is the Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Board at the City of Washington in said District this 21st day of February, 1931.

B. D. Gamble, Clerk United States Board of Tax Appeals. (Seal.)

cgh.

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[fol. 74] GULF STATES STEEL COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

John W. Drye, Jr., Esq., 80 Broadway, New York City, and Stewart M. Seymour, Esq., 80 Broadway, New York City, appearing on behalf of the Petitioner.

James A. O'Callaghan, Esq., and W. H. Lawder, Esq. (A. W. Gregg, Esq., General Counsel, Bureau of Internal Revenue), on behalf of the Commissioner of Internal Revenue, Respondent.

July 9, 1926.—Petition received and filed.

July 13, 1926.—Copy Petition served on Solicitor.

July 13, 1926.—Notifications of receipt mailed to taxpayer.

July 28, 1926.—Motion for 120 days extension to answer or to move filed by Solicitor.

July 31, 1926.—Granted both sides notified.

[fol. 75] January 10, 1927.—Motion for extension to March 10, 1927 to answer filed by General Counsel.

Jan. 11, 1927.—Granted, both sides notified.

Jan. 29, 1927.—Answer filed by General Counsel.

Feb. 21, 1927.—Motion to consolidate with Dockets 9276 and 18359 for hearing filed by taxpayer.

Feb. 24, 1927.—Granted, both sides notified.

March 2, 1927.—Motion to amend filed by taxpayer. Amended petition tendered.

March 2, 1927.—Copy of answer served on taxpayer. Assigned to General Calendar.

March 4, 1927.—Both sides notified.

March 7, 1927.—Copy of motion and amended petition served on General Counsel.

March 28, 1927.—Stipulation as to continuance to 5-19-27 filed.

April 29, 1927.—Motion for extension to 5-14-27 to file answer filed by General Counsel 4-30-27.

May 2, 1927.—Ordered proceedings to be placed on Day Calendar of 5-19-27 signed and filed. Both sides notified.

[fol. 76] May 14, 1927.—Answer filed by General Counsel. Copy served 5-18-27.

May 19, 1927.—Hearing had before Mr. Green. See minutes in 9276.

May 25, 1927.—Transcript of hearing 5-19-27 filed.

June 28, 1927.—Motion for extension 7-1-27 to 7-31-27 to file brief, filed by General Counsel. See 9276.

June 29, 1927.—Granted, both sides notified.

July 1, 1927.—Brief filed by taxpayer.

July 15, 1927.—Motion for extension 7-20-27 to 8-20-27 to file brief. Filed by taxpayer.

July 16, 1927.—Granted. Both sides notified.

July 27, 1927.—Brief filed by General Counsel.

Aug. 18, 1927.—Motion for extension to 8-27-27 to file brief. Filed by taxpayer. See 9276.

Aug. 18, 1927.—Granted. Both sides notified.

Aug. 27, 1927.—Reply brief filed by General Counsel. See 9276—18359.

July 10, 1928.—Findings of facts and opinion rendered by Mr. Green. Judgment will be entered on 15 days notice under rule 50.

[fol. 77] October 25, 1928.—Order of redetermination entered.

Nov. 15, 1928.—Motion to vacate order of redetermination filed by General Counsel. See 9276. Granted 11-17-28.

Nov. 20, 1928.—Hearing set 12-17-28.

Dec. 1, 1928.—Order motion to vacate 11-15-28 be set for hearing 12-17-28. Motion entered.

Dec. 17, 1928.—Hearing had before Mr. Phillips on Respondent's motion to reopen, denied.

Dec. 19, 1928.—Order denying respondent motion to reopen case entered.

Apr. 9, 1929.—Petition for review by U. S. Circuit Court of Appeals, Fifth Circuit, with assignment of error filed by General Counsel.

Apr. 19, 1929.—Proof of service of petition for review filed.

May 13, 1929.—Copy of order of Judge Foster extending time 8-8-29 for settlement of record filed.

Aug. 5, 1929.—Copy of order of Judge Foster extending time 10-8-29 for settlement of record filed.

Oct. 11, 1929.—Motion for extension to 12-8-29 to prepare and deliver. Order filed by taxpayer.

[fol. 78] Oct. 11, 1929.—Copy of order from U. S. Circuit Court of Appeals, Fifth Circuit granting extension through 12-8-29 to prepare and deliver.

Dec. 9, 1929.—Certified copy of order from U. S. C. C. of A, Fifth Circuit dismissing petition for review filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 5774

COMMISSIONER OF INTERNAL REVENUE

versus

GULF STATES STEEL COMPANY

ORDER DISMISSING PETITION FOR REVIEW—Filed Dec. 9, 1929

Extract from the Minutes of December 3rd, 1929

On Consideration of the motion of Counsel for petitioner, it is ordered by the Court that this cause be, and it is hereby, dismissed.

[fol. 79] Clerk's Office

A true copy. Attest:
(Sgd.) Oakley F. Dodd, Clerk U. S. Circuit Court of Appeals, Fifth Circuit. (Seal.)

New Orleans, La., Dec. 3, 1929.

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CERTIFICATE OF CLERK

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, hereby certify that in the proceeding at Docket No. 18358, wherein the Gulf States Steel Company is the petitioner and the Commissioner of Internal Revenue is the respondent, the Board, on October 25, 1928, rendered a decision that the collection of the deficiency, if any, in income and profits taxes for the year 1917 is barred by the statute of limitations, and that there are deficiencies of $4,304.99, $1,496.20 and $293.53, respectively, for the years 1918, 1919 and 1920; that a motion to vacate the Board's order of redetermination, and set the case for re-argument, [fol. 80] filed by the respondent on November 15, 1928,

was denied by the Board at a hearing on December 17, 1928, and order denying said motion was entered on December 19, 1928; that thereafter on April 9, 1929, the General Counsel, representing the Commissioner of Internal Revenue, filed petition for review of the Board's decision in the United States Circuit Court of Appeals for the Fifth District, notice of filing and proof of service being filed on April 19, 1929; that appellate court orders enlarging the time for the settlement of the evidence and the transmission of the record on review to August 8, 1929, October 8, 1929, and December 8, 1929 were filed on May 31, 1929, August 5, 1929 and October 11, 1929, respectively; that no further documents have been filed by the General Counsel in the prosecution of the above mentioned petition for review; that no review record has been perfected or prepared for transmission to the Fifth Circuit Court of Appeals; and that the General Counsel has requested this certificate in order that the said petition for review may be docketed and dismissed.

(Signed) B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

Dated November 5, 1929.

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[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

B. T. A. Docket No. 18358

[Title omitted]

MOTION FOR EXTENSION OF TIME—Filed Oct. 11, 1929

Comes now the Commissioner of Internal Revenue, petitioner in the above-entitled cause now pending upon a petition filed with the United States Board of Tax Appeals to have its decision reviewed by the United States Circuit Court of Appeals, for the Fifth Circuit, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves that the time for the settlement of the evidence and the transmission of the record on review be extended from October 8, 1929, to and including December 8, 1929.

This motion is made for the reason that the United States Supreme Court rendered its decision on May 13, 1929, in

the case of United States v. John Barth Company and the United States Fidelity and Guaranty Company, Docket No. [fol. 82] 526, which decision may have some effect upon the above entitled cause, and additional time is required for the purpose of considering the effect of that decision and whether or not the petition for review in this cause should be further prosecuted.

This motion is not made merely for the purpose of delay and the granting of the same will in no way prejudice the rights of the respondent.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

SSF/bdm.

November 5, 1929.

GC:A:SSF.

Hon. C. M. Charest, General Counsel, Bureau of Internal Revenue, Walker-Johnson Building, Washington, D. C.

In re Appeal of Gulf States Steel Company, Docket No. 18358

Sir: In response to your letter dated November 2, 1929, [fol. 83] I am inclosing herewith certificate sur petition for review of the above entitled proceeding.

Respectfully, (Signed) B. D. Gamble, Clerk Board of Tax Appeals.

Incl.
d.
Filed Nov. 2, 1929.
GC:A:SSF.

Treasury Department, Bureau of Internal Revenue, Washington

Nov. 2, 1929.

Hon. B. D. Gamble, Clerk U. S. Board of Tax Appeals, Earle Building, Washington, D. C.

Sir:

In re Commissioner of Internal Revenue vs. Gulf States Steel Company, B. T. A. Docket No. 18358, U. S. C. C. A., 5th

Reference is made to the above-entitled cause pending on a petition for review filed by the Commissioner to have

the Board's decision reviewed by the United States Circuit [fol. 84] Court of Appeals for the Fifth District.

It is proposed on behalf of the Commissioner to move for a dismissal of the petition for review. You are requested to furnish this office with an appropriate certificate in order to have the petition for review docketed and dismissed.

Your kindness will be appreciated.

Respectfully, (Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Filed Oct. 11, 1929.

Order

On consideration of the above motion, it is ordered that the time for the settlement of the evidence and the transmission of the record on review in said cause be further extended from October 8, 1929, to and including December 8, 1929.

(Sgd.) R. W. Walker, U. S. Circuit Judge.

Atlanta, Ga., October 7, 1929.

Filed Aug. 5, 1929.

On consideration of the above motion, it is ordered that the time for the settlement of the evidence and the trans- [fol. 85] mission of the record on review in said cause be extended from August 8, 1929, to and including October 8, 1929.

(Signed) Rufus E. Foster, United States Circuit Judge.

New Orleans, La., August 2nd, 1929.

Aug. 5, 1929.

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Before United States Board of Tax Appeals for the Fifth Circuit

B. T. A. Docket, No. 18358

[Title omitted]

Motion for Extension of Time

Comes now the Commissioner of Internal Revenue, petitioner in the above-entitled cause now pending upon a petition for review filed with the United States Board of Tax

Appeals to have its decision reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, by and through his attorney, C. M. Charest, General Counsel, [fol. 86] Bureau of Internal Revenue, and moves that the time for the settlement of the evidence and the transmission of the record on review be extended from August 8, 1929, to and including October 8, 1929.

This motion is made for the reason that the United States Supreme Court rendered its decision on May 13, 1929, in the case of the United States v. John Barth Company and the United States Fidelity and Guaranty Company, Docket No. 526, which decision may have some effect upon the above-entitled cause, and additional time is required for the purpose of considering the effect of that decision and whether or not the petition for review in this cause should be further prosecuted.

This motion is not made merely for the purpose of delay and the granting of the same will in no way prejudice the rights of the respondent.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

SSF/bdm.

[fol. 87] Filed May 31, 1931.

5-28-29.

C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, Washington, D. C.

DEAR SIR: Yours of May 25th, enclosing motion for an extension of time for the settlement of the evidence and the transmission of the record on review in re Commissioner of Internal Revenue, petitioner, vs. Gulf States Steel Company, received this morning.

Pursuant to said motion, the court has, this day, entered an order extending the time for the settlement of the evidence and the transmission of the record on review until and including August 8, 1929. Enclosed, you will find a copy of the motion and order as entered.

Respectfully, Oakley F. Dodd, Clerk.

OFD/b.

Enc.

CC. Clerk U. S. Board of Tax Appeals, Washington D. C.

[fol. 88] UNITED STATES CIRCUIT COURT OF APPEALS FOR FIFTH CIRCUIT

B. T. A. Docket No. 18358

[Title omitted]

MOTION FOR EXTENSION OF TIME—Filed May 31, 1929

Comes now the Commissioner of Internal Revenue, petitioner in the above-entitled cause now pending upon a petition for review filed with the United States Board of Tax Appeals to have its decision reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves that the time for the settlement of the evidence and the transmission of the record on review be extended from June 8, 1929, to and including August 8, 1929.

This motion is made for the reason that the United States Supreme Court rendered its decision on May 13, 1929, in the case of United States v. John Barth Company and the [fol. 89] United States Fidelity and Guaranty Company, Docket No. 526, which decision may have some effect upon the above-entitled cause, and additional time is required for the purpose of considering the effect of that decision and whether or not the petition for review in this cause should be further prosecuted.

This motion is not made merely for the purpose of delay and the granting of the same will in no way prejudice the rights of the respondent.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

SSF/bdm.

Order

On the consideration of the above motion, it is ordered that the time for the settlement of the evidence and the transmission of the record on review be extended to and including August 8th, 1929.

(Signed) Rufus C. Foster, U. S. Circuit Judge.

New Orleans, La., May 28th, 1929.

[fol. 90] UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

[Title omitted]

NOTICE OF PETITION FOR REVIEW—Filed April 19, 1929

To Gulf States Steel Company, Birmingham, Alabama, Respondent on Review:

Please take notice that the Commissioner of Internal Revenue did on the 9th day of April, 1929, file with the U. S. Board of Tax Appeals a petition for a review of the decision of said Board in the above-entitled cause by the United States Circuit Court of Appeals for the Fifth Circuit, a copy of which said petition for review is herewith served upon you.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Petitioner on Review.

[fol. 91] Service of the foregoing notice and service of a copy of the petition for review mentioned in said notice is acknowledged this 13th day of April, 1929.

Gulf States Steel Company, Respondent on Review,
(Signed) by S. A. Forsyth, Treasurer.

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UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

[Title omitted]

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT—Filed April 9, 1929

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mabel Walker Willebrandt, As-
[fol. 92] sistant Attorney General, C. M. Charest, General

Counsel, Bureau of Internal Revenue, and Shelby S. Faulkner, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner on review (Hereinafter referred to as the Commissioner) is duly appointed, qualified and Acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is a corporation incorporated and organized under and by virtue of the laws of the State of Delaware, having its principal office and place of business in the City of Birmingham, State of Alabama. For the calendar year 1917 the taxpayer filed with the United States Collector of Internal Revenue for the District of Alabama, Federal corporation income and profits tax returns. The office of the United States Collector of Internal Revenue for the District of Alabama was at the time of the filing of said returns and is now located in the City of Birmingham, State of Alabama, within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit.

II

The taxpayer filed corporation income and profits tax returns for the calendar year 1917 showing thereon a tax of $989,790.57. Thereafter said returns were examined by [fol. 93] the Commissioner, which examination resulted in the assessment by him in April, 1921, of additional income and profits taxes in the amount of $153,815.30. Thereafter on May 6, 1921, the taxpayer filed with the Collector of Internal Revenue a claim for the abatement of the additional tax. Thereafter the Commissioner rejected said claim in abatement for the full amount and under date of May 12, 1926, in accordance with the provisions of Section 283 (e) or Section 283 (k) of the Revenue Act of 1926 sent to the taxpayer by registered mail a notice of the rejection of the claim in abatement or a notice of deficiency in the amount of $153,815.30. Thereafter on July 9, 1926, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals. The hearing upon the appeal by the Board of Tax Appeals was held on May

19, 1927, which date was subsequent to the enactment of the Revenue Act of 1926. On July 10, 1928, the Board of Tax Appeals promulgated its findings of fact and opinion in said appeal, and on October 25, 1928, the Board entered its order of redetermination in accordance with its findings of fact and opinion, wherein and whereby it ordered and decided that for the year 1917 the collection of the deficiency, if any, in income and excess profits taxes for the year 1917 is barred by the statute of limitations.

[fol. 94] III

The nature of the controversy is as follows:

On March 28, 1918, the taxpayer filed its income and excess profits tax returns for the calendar year 1917 with the Collector of Internal Revenue for the District of Alabama. The returns showed a tax due of $989,790.57, which was paid on June 25, 1918. Thereafter the returns were examined by the Commissioner, which examination resulted in the assessment by him in April, 1921, of an additional tax of $153,815.30. On or about May 6, 1921, the taxpayer filed with the Collector a claim for the abatement of the additional tax on the ground that for reasons stated in the claim the alleged deficiency did not exist. Between the date of the filing of the claim and May 4, 1926, several documents in the nature of protests in support of the claim were filed by the taxpayer with the Commissioner and several hearings were granted. Three bonds have been executed and filed with the Collector. The first was on March 13, 1923, and was in response to a demand in writing from the Collector for the additional tax. This bond is in the following language:

(See Exhibit A to Complaint.)

The seals of the taxpayer and the surety were both imprinted on the face of the bond.

On April 3, 1925, the taxpayer executed and filed with [fol. 95] the Collector the following instrument or bond in place of the first bond filed March 13, 1923:

(Exhibit B to complaint.)

The second bond also contained the imprint of the taxpayer's seal.

On September 9, 1925, in order to obtain the release of the $200,000 of Liberty Bonds deposited with the second bond the taxpayer and the National Surety Company as surety executed and filed with the Collector a third bond, which is now in effect and reads as follows:

(Exhibit C to complaint.)

Both companies' seals were imprinted on the last bond.

The taxpayer contended before the Board of Tax Appeals that the collection of the additional tax determined to be due by the Commissioner was barred by the statute of limitations.

The Commissioner contended that the claim in abatement and/or the bonds above set forth extended the period of limitations for the collection of the additional tax and further contended that the taxpayer was estopped to deny that the period of limitations as provided by statute had been extended.

The Board of Tax Appeals held that the collection of a deficiency, if any, for the year 1917 was barred by the [fol. 96] statute of limitations and that the filing of a bond with an abatement claim does not satisfy the provisions of Section 250 (d) of the Revenue Act of 1921 requiring a consent in writing by both the Commissioner and the taxpayer as a condition precedent to the postponement of the collection beyond five years after the date the return was filed.

## IV

The Commissioner says that in the record and the proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and final order of redetermination, and upon which he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

1. The Board of Tax Appeals erred in not approving the deficiency determined by the Commissioner.

2. The Board of Tax Appeals erred in entering a judgment or order of redetermination of no deficiency in favor of the taxpayer.

3. The Board of Tax Appeals erred in holding that the statute of limitations barred collection of the additional tax [fol. 97] for the reason that said holding was not supported by any substantial and competent evidence.

4. The Board of Tax Appeals erred as a matter of law in holding that the statute of limitations barred collection of the additional tax.

5. The Board of Tax Appeals erred in not holding that the instruments referred to as bonds extended the statutory period of limitations for the collection of the additional tax.

6. The Board of Tax Appeals erred in not holding that the claim in abatement extended the statutory period of limitations for the collection of the additional tax.

7. The Board of Tax Appeals erred in not holding that the claim in abatement and the bonds together extended the statutory period of limitations for the collection of the additional tax.

8. The Board of Tax Appeals erred in not holding that the taxpayer was estopped to deny that the claim in abatement and/or the bonds extended the statutory period of limitations for the collection of the tax.

9. The Board of Tax Appeals erred in not holding that the taxpayer and the Commissioner of Internal Revenue had consented in writing to a determination, assessment and collection of the additional tax irrespective of any statutory period of limitations.

[fol. 98] Wherefore the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit and that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the clerk of said Court for filing and that appropriate action be taken to the end that the errors

complained of may be reviewed and corrected by said Court.

(Sgd.) Mabel Walker Willebrandt, Assistant Attorney General; (Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue; (Sgd.) Shelby S. Faulkner, Special Attorney, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

[fol. 99] *Duly sworn to by C. M. Charest. Jurat omitted in printing.*

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[fol. 100] UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

ORDER DENYING MOTION TO VACATE

The respondent having filed his motion that the decision heretofore promulgated in these proceedings on July 10, 1928, be set aside and that the final order of redetermination entered herein October 25, 1928, be vacated, and that these proceedings be set for reargument for the purpose of permitting the respondent to present to the Board further arguments on the question of the statute of limitations, and said motion having duly come on for hearing and the parties having appeared by their counsel and counsel for the respondent having been heard in support of said motion, and due consideration having been given thereto, it is

Ordered that the said motion of the respondent be and the same is hereby denied.

B. D. Gamble, Clerk United States Board of Tax Appeals. (Signed) Percy W. Phillips, Member United States Board of Tax Appeals.

Entered Dec. 19, 1928.

[fol. 101] UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 19359

[Title omitted]

ORDER SETTING MOTION FOR HEARING

Upon further consideration of the motion filed by the respondent November 15, 1928, and granted November 18, 1928,

It is ordered that the order of November 18, 1928, granting the respondent's motion be and the same hereby is set aside and vacated, and it is further

Ordered that such motion be set down for hearing on December 17, 1928.

(Sgd.) William R. Green, Jr., Member United States Board of Tax Appeals.

Dated Washington, D. C., December 1, 1928.

A true copy. Teste: B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

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[fol. 102] UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket Nos. 9276, 18358, and 18359

[Title omitted]

NOTICE OF SETTING PROCEEDING FOR HEARING—November 20, 1928

Please take notice that the above-entitled proceeding has been placed on the Board's Day Calendar for hearing before a Division thereof at its Washington office, 12th and E Streets, Northwest on Dec. 17, 1928.

The Day Calendar will be called at 9:30 a. m., on the above-designated day, and this proceeding will be called and assigned at that time and heard in due course.

It will be necessary for you to appear at the time and place specified and produce such witnesses and adduce such

evidence as may be necessary to prove the facts upon which you rely to support your contention. See rules 29 and 30. [fol. 103] Your attention is also invited to Rule 2 as to the qualifications of persons entitled to practice before the Board.

No further notice of hearing will be sent and no continuance will be granted, except for cause shown. See Rule 20.

(Sgd.) B. D. Gamble, Clerk.

To John Drye, Jr., Esq., 80 Broadway, New York, N. Y.

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UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358 and 18359

[Title omitted]

MOTION TO VACATE—Filed Nov. 15, 1928

Now comes the respondent, Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves that the decision [fol. 104] heretofore promulgated in this case on July 10, 1928, be set aside, and that the final order of redetermination entered October 25, 1928 be vacated, and that the case be set for re-argument before the Board, or a division thereof, for the purpose of permitting the respondent through his counsel, to present to the Board further arguments on the question of the statute of limitations, which it is believed will convince the Board that its decision and final order are incorrect.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: James A. O'Callaghan, Special Attorney, Bureau of Internal Revenue.

Granted Nov. 17, 1928.

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UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

ORDER OF REDETERMINATION

This matter came on for hearing pursuant to notice under Rule 50, the respondent having filed his proposed

[fol. 105] recomputation of tax and the petitioner having filed no protest or alternative thereto, and it appearing that such proposed recomputation is in all respects in accordance with the findings of fact and opinion of this Board:

It is ordered and adjudged that the collection of the deficiency, if any, in income and excess profits taxes for the year 1917 is barred by the statute of Limitations, and that there is a deficiency in income and profits taxes for the year 1918 in the amount of $4,304.99, for the year 1919 in the amount of $1,496.20, and for the year 1920 in the amount of $293.53.

—— ——, Member United States Board of Tax Appeals.

A true copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

A true copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.

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[fol. 106] UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

GULF STATES STEEL COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated July 1, 1928

Statute of Limitations.—The filing of a bond with an abatement claim does not satisfy the provision of Section 250(d) of the Revenue Act of 1921 requiring a consent in writing by both the Commissioner and the taxpayer as a condition precedent to the postponement of the collection beyond five years after the date the return was filed.

John Drye, Jr., Esq., and Stewart M. Seymour, Esq., for the petitioner.

James A. O'Callaghan, Esq., and W. H. Lawder, Esq., for the respondent.

## Findings of Fact and Opinion

In this proceeding petitioner seeks a redetermination of the income and profits taxes for the years 1917, 1918, 1919 and 1920, for which the Commissioner has determined deficiencies of $153,815.30, $4,482.92, $1,934.30 and $928.17, respectively. The deficiency for the year 1917 is represented by the rejection of a claim for abatement by letter dated May 12, 1926.

[fol. 107] Petitioner alleges error on the part of the Commissioner (1) in disallowing deductions for all years involved as amortization of the cost to petitioner of the lease of certain iron ore properties held by the petitioner in the name of the Clinton Mining Company, a corporation affiliated with the petitioner; (2) in disallowing for all years involved a reasonable amount as a deduction to the Clinton Mining Company for the depletion of the iron ore leasehold, based upon the March 1, 1913, value thereof; (3) in reducing the invested capital of petitioner for the year 1917 on account of the acquisition by it of certain of its outstanding stock on January 2, 1915, in an amount greater than the cost to petitioner of the stock so acquired; and (4) in failing to determine that the collection of any part of the deficiency for the year 1917 was barred by the statute of limitations.

### Findings of Fact

The petitioner is a corporation organized on November 1, 1913, under the laws of the State of Delaware, with its principal office at Birmingham, Alabama.

On March 28, 1918, it filed its income and excess profits tax returns for the calendar year 1917 with the Collector of Internal Revenue for the District of Alabama. The returns showed a tax due of $989,790.57, which was paid on June 25, 1918. Thereafter the returns were examined by the Commissioner, which examination resulted in the [fol. 108] assessment by him in April, 1921, of an additional tax of $153,815.30. On or about May 6, 1921, the petitioner filed with the Collector a claim for the abatement of the additional tax on the ground that for reasons stated in the claim the alleged deficiency did not exist. Between the date of the filing of the claim and May 4, 1926, several documents in the nature of protests in support of the claim

were filed by the petitioner with the Commissioner and several hearings were granted in the Bureau. Three bonds have been executed and filed with the Collector. The first was on March 13, 1923, and was in response to a demand in writing from the Collector for the additional tax. This bond is in the following language:

(Here follows the same bond as is made Exhibit A to the complaint.)

The seals of the petitioner and the surety were both imprinted on the face of the bond.

On March 11, 1925, the petitioner's Board of Directors met and passed a resolution authorizing Calvert Brewer, Assistant Secretary of the petitioner to deposit with the Federal Reserve Bank of New York, U. S. Liberty Loan Bonds of the par value of $200,000 and to authorize the said Bank to hold said bonds for the benefit of the Collector for the District of Alabama "to assure him of the payment by the duly authorized officers of this Company of such taxes, interest and penalties as may be demanded from this company should the claim filed by this company for [fol. 109] the abatement of an additional income and excess profits tax assessment of $153,815.30 for the year 1917 be denied in whole or in part." The resolution further provided that Brewer was "authorized and directed to do any and all things necessary and proper to fully and effectively carry out the instructions hereby given."

On April 3, 1925, the petitioner executed and filed with the Collector the following instrument or bond in place of the first bond filed March 13, 1923:

(Here follows the same bond that is made Exhibit B to the complaint.)

The second bond also contained the imprint of the petitioner's seal.

On September 9, 1925, in order to obtain the release of the $200,000.00 of Liberty Bonds deposited with the second bond the petitioner and the National Surety Company as surety executed and filed with the Collector a third bond, which is now in effect and reads as follows:

(Here follows the same bond which is Exhibit C-1 to the complaint.)

Both companies' seals were imprinted on the last bond.

More than five years have elapsed since the returns for 1917 were filed, and the alleged deficiency has not been collected from the petitioner. No suit or proceeding for the collection of the alleged deficiency for 1917 was begun be-
[fol. 110] fore the expiration of five years after the date the returns were filed.

The allowance for each of the years 1918 to 1920 for depletion or exhaustion of the leasehold of the Clinton Mining Company, based upon the March 1, 1913, value thereof, has been stipulated by the parties as follows:

| Year | Allowance |
|---|---|
| 1918 | $10,946.52 |
| 1919 | 8,790.23 |
| 1920 | 6,346.40 |

The respondent disallowed a deduction of $55,987.10 as depreciation on stock, whereas the deduction taken on this item in the return was $39,987.49.

The above stipulation disposes of issues 1 and 2 by agreement of the parties.

## Opinion

Green:

The petitioner raises the question of the statute of limitations and contends that the respondent is now barred by statute from collecting any portion of the additional tax of $153,815.30 assessed by him in April, 1921.

The respondent contends that at all times he has been fully protected by means of the several bonds which were executed and filed with the Collector. He argues that the petitioner is estopped from pleading the statute of limita-
[fol. 111] tions and that the effect of the bonds was to waive any limitations provided for by statute. He points out that the words determination, assessment and collection in the phrase "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax" contained in section 250(d) of the Revenue Act of 1921 are in the conjunctive and not the disjunctive; that since both the determination and assessment were already made on November 23, 1921, the date of the passage of the 1921 Act, the parties could not have

consented to a later determination and assessment thereof; that the Act did not provide for a waiver as to collection only; and that, therefore, the Commissioner was legally justified in accepting through the Collector any form of waiver recognized by law. He further contends that even if the Act be held to provide for a waiver as to collection where the determination and assessment had already been made the words "consent in writing" did not contemplate that both parties actually sign the consent and that the filing of the first bond fifteen days prior to the expiration of the five-year period for collection operated to completely satisfy the statute requiring that "Both the Commissioner and the taxpayer" should "consent in writing" if the tax were to be collected after five years from the date of filing the returns.

Prior to the passage of the Revenue Act of 1918 there was no limitation upon the right of the Government to sue for and recover unpaid taxes. The Dollar Savings Bank v. United States, 19 Wall. 227, 86 U. S. 227. Section 250(d) [fol. 112] of that Act provided for the first time that:

Except in the case of a false or fraudulent return with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. • • •

The 1918 Act did not provide for any waiver of the time within which the amount of tax due could be determined, assessed and collected. In the case of false or fraudulent returns, the tax could be determined and collected "at any time after it becomes due".

Upon the passage of the Revenue Act of 1921, Congress provided in Section 250(d) that the amount of any income, excess-profits or war-profits taxes due for any of the taxable years under any of the prior acts:

Shall be determined and assessed within five years after the return was filed, **unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax**; and no suit or proceeding for the collection of any such taxes • • • shall be

begun, after the expiration of five years after the date when [fol. 113] such return was filed * * *. (Blackface ours.)

The only other exceptions to the running of the statute of limitations contained in Section 250(d) of the 1921 Act, none of which the respondent contends are applicable here, are (1) in the case of false or fraudulent returns with intent to evade taxes, (2) failure to file the required return, (3) cases coming within the scope of paragraph (9) of subdivision (a) of section 214 or paragraph (8) of subdivision (a) of section 234, or (4) cases of final settlement of losses contingently allowed by the Commissioner pending a determination of the exact amount deductible.

No part of the additional tax of $153,815.30 assessed in April, 1921, has as yet been collected. Substantially the same provisions regarding a consent in writing as to a later determination, assessment and collection of prior-year taxes as contained in section 250(d) of the Revenue Act of 1921 are contained in section 278(c) of the Revenue Acts of 1924 and 1926.

Since the respondent does not contend that any of the other exceptions to the running of the statute contained in section 250(d) of the Revenue Act of 1921 are applicable and since more than five years have expired from the filing of the return on March 28, 1919, he can justify collection only upon one of two grounds: (1) that he and the petitioner have consented in writing to a later determination, assessment and collection of the tax, or (2) that the effect [fol. 114] of the bonds was such as to abrogate the limitation provision contained in the statute. No "consent in writing" as such has been signed. Upon this the parties agree. The respondent, therefore, fails on his first ground unless the bonds can be construed to satisfy this provision. The effect of filing a bond was thoroughly considered by us in C. B. Shaffer v. Commissioner, 12 B. T. A. —, promulgated June 1, 1928, wherein the facts were substantially on all fours with the facts in the instant case. In that case we said:

* * * We conclude that not only the instrument itself, but also the conditions under which it was given show that the bond is not a "consent in writing" prescribed by section 250(d) as authority for extending the five year statute of limitations.

In addition to what we said in the Shaffer case, we might add that there is no express reference to the statute of limitations in any of the bonds involved herein. The respondent in effect would have us hold that by giving the bonds the petitioner impliedly intended to waive the statute with respect to collection. Such a contention might merit serious consideration were it not for the fact that from September 11, 1922, the date of publication of I. T. 1446 (C. B. 1-2, p. 218), until February 21, 1927, the date Bowers v. New York & Albany Lighterage Company, 273 U. S. 346, was decided the respondent believed that if he assessed [fol. 115] the taxes within the five year period the collector could collect them by means of distraint at any time.

There is no evidence in the record that on March 13, 1923, the date the first bond was given, or any other date, the petitioner was anything but solvent and able to pay all the additional tax assessed. If on March 13, 1923, fifteen days prior to the expiration of the five-year period, it was believed that the collection by distraint could be made at any time, what limitation was there for petitioner, a solvent person, to waive? None except collection by suit, and as was said in the Bowers v. New York & Albany Lighterage Company case, supra, "in fact distraint is much more frequently resorted to than is suit for the collection of taxes." Under such circumstances, we cannot hold that there was an intent to waive the statute implied in the bonds when the expression of such an intent was lacking or that there has been established any basis for the application of the doctrine of estoppel. Neither do we think it material that prior to the passage of the 1921 Act the Commissioner had already assessed the proposed additional tax. He did not make a final determination until May 12, 1926, the date he proposed to reject the abatement claim. We think a valid consent in writing could have been entered into by the petitioner and the Commissioner to a later determination and coll-ction of the tax, the assessment having been already made. Compare United States v. The John Barth Company, et al., U. S. Circuit Court of Appeals for the Seventh District, decided June 7, 1928. [fol. 116] In view, however, of section 612 of the Revenue Act of 1928 repealing section 1106(a) of the 1926 Act as

of February 26, 1926, we do not regard this case as authority for anything more than the rule that a bond cannot be considered as a waiver of the statute of limitations.

None of the bonds in the instant case can be said to constitute a consent in writing by both the Commissioner and the taxpayer to a later determination, assessment and collection of the tax in question, and no other exception to the running of the statute of limitations provided in any of the Acts being present, and no suit or proceeding for the collection of tax having been begun prior to the expiration of five years from the date of filing the return, and the five-year period having expired prior to the passage of the Revenue Act of 1924, we hold that the respondent is now barred by statute from collecting any part of the additional assessment made in April, 1921, and that there is no deficiency for the year 1917. Bowers v. New York & Albany Lighterage Company, supra; C. B. Shaffer v. Commissioner, supra; United States v. The John Barth Co., supra; Art Metal Works v. Commissioner, 9 B. T. A. 491. Our decision in this respect in no wise deposes of any questions arising as to liability on the bond.

In view of our conclusions in the foregoing opinion it does not become necessary to consider the third issue relating to invested capital for 1917. Issues 1 and 2 were disposed of by stipulation.

[fol. 117] There is no deficiency for the year 1917. The deficiencies for 1918, 1919 and 1920, will be redetermined in accordance with the stipulation of the parties.

Reviewed by the Board.

Judgment will be entered on 15 days' notice under Rule 50.

Milliken dissents.

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UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

MOTION FOR EXTENSION OF TIME

Now comes the petitioner by its attorney, John Drye, Jr., and moves that the time for filing the petitioner's reply

brief in the above entitled case be extended from August 20, to August 27, 1927. The ground for the motion is:
[fol. 118] Petitioner's reply brief has not been completed owing to the practically continued absence from his office of petitioner's attorney since the receipt of copy of the respondent original brief.

(Signed) John Drye, Jr., Attorney for Petitioner,
80 Broadway, New York, N. Y.

(Filed August 18, 1927.)
(Granted August 18, 1927.)

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UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

MOTION FOR EXTENSION OF TIME

Now comes the respondent, Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel Bureau of Internal Revenue, and moves that the time for filing the respondent's brief in the above entitled case be extended from July 1, 1927, to July 31, 1927 inclusive. The ground for this motion is:
[fol. 119] That the special attorney to whom the case is assigned in this office was engaged in the trial of cases, before a Division of the Board at St. Paul, Minnesota, and in taking depositions at Duluth, Minnesota, from June 2, to June 27, 1927.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel: James A. O'Callaghan, Special Attorney, Bureau of Internal Revenue.

(Filed June 23, 1927.)
(Granted June 29, 1927.)

UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

STIPULATION RE EXHIBITS

It is hereby stipulated and agreed by and between the [fol. 120] parties to the above entitled cause, through their respective attorneys, that the three bonds and the power of attorney attached to one of the bonds, which were introduced as exhibits in the trial of the said case before the Board of Tax Appeals on May 19, 1927, may be withdrawn by the respondent herein, and photostatic copies thereof substituted in the record.

——— ———, Attorney for Petitioner. ——— ———, General Counsel, Bureau of Internal Revenue. Of Counsel: James O'Callaghan, Special Attorney, Bureau of Internal Revenue.

(Filed May 28, 1927.)

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UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket Nos. 18358, 9276, 18359

Appeal of Gulf States Steel Company

Admission of Service

Service and receipt of copy of brief in the above entitled appeal is hereby admitted this 2nd day of August, 1927.

(Signed) R. N. Burke, for John W. Drye, Jr.

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[fol. 121] UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

MOTION FOR EXTENSION OF TIME

Now comes the petitioner, by his attorney, John Drye, Jr., and moves that the time for filing the petitioner's reply brief in the above entitled case be extended from July 20 to August 20, 1927. The ground for the motion is:

Upon hearing the parties were directed to file their original briefs on or before July 1, 1927, and their reply briefs on or before July 20, 1927. Petitioner's original brief was filed on July 1, 1927, but the respondent obtained an extension of time to July 31, 1927. The petitioner has not received and does not expect to receive the respondent's original brief in time to file its reply brief within the time originally set by the Board.

(Signed) John W. Drye, Jr., Attorneys for Petitioner, 80 Broadway, New York City.

(Filed July 15, 1927.)
(Granted July 16, 1927.)

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[fol. 122] UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

[Title omitted]

ANSWER—Filed May 14, 1927

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the amended petition of this taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. (a) Admits that the respondent did not allow as a deduction in computing the net income of the petitioner for [fol. 123] the calendar year 1917 the sum of $47,021.82 as amortization of the alleged cost to it of a lease of certain iron ore properties held in the name of the Clinton Mining Company, or as amortization of the cost of the stock of the Clinton Mining Company, or as depletion or exhaustion of the leased properties, but denies that such action was in error.

4. (b) Admits that the respondent did not allow the Clinton Mining Company a reasonable allowance in 1917 for the amortization of the March 1, 1913, value of said lease or for depreciation or exhaustion of the leasehold

based upon the March 1, 1913, value thereof, but denies that such action was in error.

4. (c) Denies that respondent erred as stated in paragraph 4 (c).

4. (d) Denies that respondent erred as stated in paragraph 4 (d).

5. (a) 1. Admits that in 1909 the Clinton Mining Company acquired a lease of certain iron ore properties in Jefferson County, Alabama, for a period beginning October 8, 1909, and ending January 31, 1925; that in 1916 the petitioner entered into negotiations with the Clinton Mining Company to acquire this leasehold interest to insure a supply of iron ore for use in the production and manufacture of pig iron, and that the petitioner purchased all of the capital stock of the Clinton Mining Company for which it paid $145,000 in cash.

[fol. 124] Admits that the lease was worked out and the mine exhausted prior to January 31, 1925.

Admits that such other property in small amounts as was owned by the Clinton Mining Company at the time was paid for at its inventory value, the price being in addition to the amount paid for the capital stock, and that the capital stock was transferred to the petitioner instead of the leasehold.

5. (a) 2. Admits that the mine was exhausted in November, 1921.

Denies that tonnage was recoverd from December 1, 1916, the date of purchase of the stock of the Clinton Mining Company to the exhaustion of the mine in 1921 in the annual amounts alleged in paragraph 5 (a) 2 of the petition.

5. (a) 3. Denies the allegations set forth in paragraph 5 (a) 3.

5. (b) 1. Admits that the Clinton Mining Company as lessee of the ore properties is entitled to a reasonable allowance for exhaustion or depletion of the leased properties based upon the March 1, 1913, value of the leasehold and that the amount allowable should be deducted in computing the consolidated net income of the petitioner and the Clinton

Mining Company subject to the income and profits tax imposed by the Revenue Act of 1917.

[fol. 125] Denies the allegation upon information and belief that the fair value of the lease on March 1, 1913, was at least $145,000 plus the amount paid for the ore extracted between March 1, 1913, and December 1, 1916.

5. (b) 2. Admits that no allowance has been made by the Commissioner to either of the affiliated companies for the exhaustion or depletion of the leased properties in computing the consolidated net income for 1917.

5. (c) 1. Admits that the petitioner was organized under the laws of the State of Delaware on November 1, 1913, and that the authorized capital stock was $15,500,000 divided into shares of the three classes of a par value of $100 per share as set forth in paragarph 5 (c) 1.

5. (c) 2. Admits that the petitioner on the first day of December, 1913, issued to the Standard Steel Company, an Alabama corporation, $15,500,000 of its capital stock ($15,500,000 of the stock being actually issued but $500,000 of the first preferred stock being simultaneously returned to the treasury of the petitioner) in consideration of the transfer to the petitioner of the properties and current assets of the Standard Steel Company and the agreement of the Standard Steel Company to pay to the petitioner the sum of $1,981,887.50 in cash.

5. (c) 3. Denies the allegations set forth in paragraph 5 (c) 3.

[fol. 126] 5. (c) 4. Admits the obligation of the Standard Steel Company to pay the $1,981,887.50 was secured by a pledge with the petitioner of the petitioner's capital stock so issued of a par value of $7,348,622.64.

5. (c) 5. Admits that of the $1,981,887.50 to be paid to the petitioner as per the aforementioned agreement, $1,000,000 was paid and the remaining $981,887.50 was to be paid by the Standard Steel Company on January 2, 1915.

5. (c) 6. Admits that the $15,000,000 par value of stock of the petitioner was outstanding on January 1, 1914, and

remained outstanding until January 2, 1915 (the date of the maturity of the obligation of the Standard Steel Company to pay the $981,887.50 in cash).

Denies that the Standard Steel Company was without funds to liquidate this obligation on the due date and that there was no market at the time for securities of this nature, and denies further, that it was agreed that the amount of indebtedness could not be realized upon the sale of the stock, and that the Standard Steel Company was without funds to pay any deficiency resulting from a sale made to satisfy the indebtedness.

5. (c) 7. Admits that an agreement was entered into between the petitioner and the Standard Steel Company whereby the indebtedness of $981,887.50 was cancelled in consideration of the transfer to the petitioner of its stock of the par value of $7,348,622.64 theretofore held by it as [fol. 127] collateral security for the payment of this indebtedness.

5. (c) 8. Admits that during the year 1916 the petitioner resold for the sum of $1,491,303.41 in cash $740,000 of its first preferred, $892,930.62 of its second preferred and $1,715,692.02 of its common stock, or a total par value of stock of $3,348,622.64, thereby increasing the amount of the petitioner's outstanding stock, excluding that purchased and held in the treasury, to $11,000,000 and that this amount of stock remained outstanding during the years 1916 and 1917.

5. (c) 9. Admits the allegations set forth in paragraph 5 (c) 9.

5. (c) 10. Denies the allegations set forth in paragraph 5 (c) 10.

5. (c) 11. Admits the allegations set forth in paragraph 5 (c) 11 excepting that portion which alleges the action of the Commissioner therein indicated to be in error.

5. (d) 1. Admits that the petitioner filed its income and profits tax returns prior to the 15th day of April, 1918, with the Collector of Internal Revenue for the District of Alabama.

Admits that the returns were thereafter audited by the Commissioner and an additional tax of $153,815.30 was determined and assessed in April, 1921.

[fol. 128] Admits that the petitioner filed a claim on May 6, 1921, with the Collector of Internal Revenue for the District of Alabama for abatement of said $153,815.30.

Admits that the Commissioner rejected said abatement claim by letter dated December 13, 1923, and avers that there were two reexaminations subsequently made of said claim based on the petitioner's protests and said claim was rejected each time as shown by Commissioner's letters dated December 4, 1925, and May 12, 1926.

Admits that more than five years have elapsed since said returns were filed and admits that the deficiency in tax has not been collected from the petitioner, but avers that under date of February 23, 1927, the Commissioner through the Collector of Internal Revenue filed notices of lien.

The Commissioner further avers that in order to protect the interests of the government, the petitioner as principal and the National Surety Company as surety did execute on September 9, 1925, a bond and conditioned upon payment of the tax in controversy, that the principal or surety, either or both, would pay to W. E. Snead, Collector of Internal Revenue, District of Alabama, the amount of the claim as was not abated, together with penalties and interest thereon as provided by law.

Denies generally and specifically each and every allegation of error or of fact contained in the taxpayer's peti-

[fol. 129] tion not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

(Sgd.) A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel: William H. Lawder, Special Attorney, Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

ORDER SETTING CAUSE

The parties in the above entitled appeal having on April 28, 1927, stipulated and agreed that these proceedings be continued from May 2, 1927, to May 19, 1927, it is

[fol. 130] Ordered that these proceedings be stricken from the day calendar of May 2, 1927, and placed on the day calendar of May 19, 1927, for hearing.

(Signed) B. H. Littleton, Member United States Board of Tax Appeals.

Dated Washington, D. C., May 2, 1927.

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UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

[Title omitted]

MOTION FOR EXTENSION OF TIME

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and moves that the time for filing answer to the amended petition filed by the petitioner in the above-entitled cause be extended from May 5, 1927, to *May 4*, 1927.

(Signed) A. W. Gregg, General Counsel, Bureau of [fol. 131] Internal Revenue. Of Counsel: William H. Lawder, Special Attorney, Bureau of Internal Revenue.

(Filed April 29, 1927.)
(Granted April 30, 1927.)
Certified copy sent to each party.

UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

STIPULATION AS TO HEARING—Filed Apr. 28, 1927

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective counsel, which appeals are consolidated for hearing and set down for May 2, 1927, that the hearing may be set over until Thursday, May 19, 1927, and it is respectfully re-
[fol. 132] quested that the Board enter its order accordingly.

—— ——, Counsel for Petitioner. A. W. Gregg, General Counsel, Bureau of Internal Revenue, Attorney for Commissioner of Internal Revenue.

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UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 18358

[Title omitted]

NOTICE OF FILING ANSWER AND PLACING PROCEEDING ON GENERAL CALENDAR—March 2, 1927

Please take notice that counsel for the Commissioner having filed his answer, the above-entitled proceeding is at issue and has been placed on the Board's General Calendar to await assignment to the day calendar for hearing. A copy of the Commissioner's answer is enclosed herewith.
[fol. 133] You will be notified in due course of such assignment and advised definitely of the time and place of hearing.

(Signed) B. D. Gamble, Clerk.

To Henry V. Poor, Esq., 80 Broadway, New York, N. Y.

UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 18358

[Title omitted]

MOTION TO FILE AMENDED PETITION

Now comes the petitioner by his attorney, John Drye, Jr., and moves to amend its petition in this proceeding in accordance with the proposed amended petition submitted herewith, and for an order directing that said proposed amended petition be filed as its amended petition in this proceeding.

The proposed amended petition assigns the same errors to the determination of the deficiency by the respondent as [fol. 134] the original petition and in addition alleges the running of the Statute of Limitations against the collection of the alleged deficiency upon the authority of the decision of the United States Supreme Court in the case of Bowers v. New York and Albany Lighterage Co., Docket No. 366, decided February 21, 1927.

The original petition was filed July 9, 1926. The answer was filed January 29, 1927. The hearing has been set for May 2, 1927, the appeal having been consolidated with appeals No. 9276 and No. 18359.

(Signed) John Drye, Jr., Attorney for Petitioner.
P. O. address: 80 Broadway, New York, N. Y.

(Filed March 2, 1927.)
(Granted March 4, 1927.)
(Certified copy sent to each party.)

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[fol. 135] UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

[Title omitted]

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the respondent

in his notice of deficiency under the provisions of Section 283 (e) or Section 283 (k) of Revenue Act of 1926 (LT:C:-E-JHLT-60D) dated May 12, 1926, and as a basis of its proceeding alleges as follows:

1. The petitioner is a Delaware Corporation with its principal office in the Brown-Marx Building, Birmingham, Alabama.

2. Upon information and belief, the notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioner on May 12, 1926. A copy of the respondent's letter dated December 4, 1925, referred to therein, is attached hereto and marked "Exhibit B".

3. The taxes in controversy are income and profits taxes assessed for the calendar year 1917, and are more than $10,000, to-wit, $153,815.30.

[fol. 136] 4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The failure and refusal of the respondent to allow as a deduction in computing the net income of the petitioner for the calendar year 1917 subject to the income and profits tax imposed by the Revenue Act of 1917 the sum of $47,021.82 as amortization of the cost to it of a lease of certain iron ore properties held in the name of the Clinton Mining Company, a corporation affiliated with the petitioner, or as amortization of the cost of the stock of Clinton Mining Company, or as depletion or exhaustion of the leased properties; or, in the alternative:

(b) The failure and refusal of the respondent to allow the Clinton Mining Company a reasonable allowance in 1917 for the amortization of the March 1, 1913, value of said lease or for depletion and exhaustion of the leasehold based upon the March 1, 1913, value thereof.

(c) The action of the respondent in reducing the invested capital of the petitioner on account of the acquisition by it of certain of its outstanding stock on January 2, 1915, in an amount greater than the cost to the petitioner of the stock so acquired.

(d) The failure of the respondent to determine that the liability, if any, of the petitioner for the payment of the

alleged deficiency, was extinguished by the failure to collect said alleged deficiency within five years after the petitioner's income and profits tax returns for the calendar [fol. 137] year 1917 were filed, and/or that the collection of said alleged deficiency was barred at the expiration of five years after said returns were filed.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a-1) In 1909, Clinton Mining Company acquired a lease of certain iron ore properties, being all and singular the land described as the south half of the southeast quarter of Section twenty, Township eighteen, Range three, west (S. 1-2 of S. E. 1-4 of Sec. 20 Tp. 18. R. 3, W.), in Jefferson County, Alabama, containing eighty acres (80), more or less, for a period beginning October 8, 1909, and ending January 31, 1925. In 1916, the petitioner entered into negotiations with Clinton Mining Company to acquire this leasehold interest to insure a supply of iron ore for use in the production and manufacture of pig iron. To accomplish the acquisition of the lease, the petitioner purchased all of the capital stock of the Clinton Mining Company, for which it paid $145,000 in cash. It was known at the time that the ore property covered by the lease would be entirely worked out and the mine exhausted prior to January 31, 1925, the date of the expiration of the lease, and this in fact happened. Such other property, in small amounts as was owned by the Clinton Mining Company at the time was paid for at its inventory value, the price being in addition to the amount paid for the capital stock; the stock was transferred instead of the leasehold solely as a matter of convenience.

(a-2) The mine was exhausted in November, 1921, and thereafter abandoned. The actual tonnage recovered from [fol. 138] December 1, 1916, the date that the petitioner acquired the leasehold through the purchase of the stock of Clinton Mining Company, to the exhaustion of the mine was as follows:

| Year | Tons |
|---|---|
| 1916 | 13,031 |
| 1917 | 159,342 |
| 1918 | 109,222 |
| 1919 | 87,708 |
| 1920 | 63,323 |
| 1921 | 58,694 |
| Total | 491,320 |

(a-3) The actual recovery of 491,320 tons under the lease costing $145,000 shows a depletion rate of 29.51¢ per ton. Upon information and belief, the allowable deduction for depletion on account of the 159,342 tons mined in 1917 is $47,021.82. The amount of the deduction taken in the return as amortization of the cost of the lease (or stock) or as depletion or exhaustion of the leased properties based on the cost of $145,000 was only $39,987.49; it is erroneously stated in the respondent's letter of December 4, 1925, that the deduction taken in the return was $55,987.10.

(b-1) If, however, it is held that petitioner must charge off the total cost of said stock in the year in which the Clinton Mining Company was abandoned, then the Clinton Mining Company, as lessee of the ore properties, is entitled to a reasonable allowance for the exhaustion or depletion of the leased properties based upon the March 1, 1913 value of the [fol. 139] leasehold, and the amount so allowed should be deducted in computing the consolidated net income of the petitioner and Clinton Mining Company subject to the income and profits tax imposed by the Revenue Act of 1917. Upon information and belief, the fair value of the lease on March 1, 1913, was at least $145,000 plus the amount paid for the ore extracted between March 1, 1913, and December 1, 1916.

(b-2) No allowance has been made by the respondent to either of the affiliated Companies for the exhaustion or depletion of the leased premises in computing the consolidated net income for 1917.

(c-1) The petitioner was organized under the laws of the State of Delaware on November 1, 1913. The authorized capital stock was $15,500,000, divided into the following shares of three classes, par value $100 per share;

$3,000,000 par value First Preferred Cumulative 7% stock.

5,000,000 par value Second Preferred 6% non-Cumulative stock.

7,500,000 par value of Common stock.

(c-2) The petitioner, on the first day of December, 1913, issued to Standard Steel Company, an Alabama Corporation, $15,500,000 of its capital stock ($15,500,000 of the stock was actually issued, but $500,000 of the First Preferred Stock was simultaneously returned to the treasury of the petitioner) in consideration of the transfer to it of the [fol. 140] properties and current assets of the Standard Steel Company and the agreement of Standard Steel Company to pay to it the sum of $1,981,887.50 in cash, a consideration appraised for the petitioner by competent engineers employed for the purpose, prior to the issuance of the stock at $15,500,00.

(c-3) Title to the property of Standard Steel Company was thereupon transferred to the petitioner.

(c-4) The obligation of Standard Steel Company to pay the $1,981,887.50 was secured by a pledge with the petitioner of $1,240,000 of First Preferred, $1,892,930.62 of the Second Preferred, and $4,215,692.02 of the Common Stock of the petitioner, a total of $7,348,622.64, which had been issued to Standard Steel Company as stated above.

(c-5) Of the $1,981,887.50 to be paid to the petitioner, $1,000,000 was presently paid. The remaining $981,887.50 was to be paid by Standard Steel Company on January 2, 1915.

(c-6) The $15,000,000 par value of stock of the petitioner was outstanding on January 1, 1914, and remained outstanding until January 2, 1915 (the date of the maturity of the obligation of Standard Steel Company to pay the $981,887.50 in cash above refererd to). The Standard Steel Company was without funds to liquidate this obligation on the due date and there was no market at the time for securities of this nature. It was agreed that the amount of the [fol. 141] indebtedness could not be realized upon the sale of the stock, and that Standard Steel Company was without funds to pay any deficiency resulting from a sale made to satisfy the indebtedness.

(c-7) Thereupon an agreement was entered into between the petitioner and Standard Steel Company whereby the indebtedness of $981,887.50 was cancelled in consideration of the transfer to the petitioner of its stock of the par value of $7,348,622.64 theretofore held by it as collateral security for the payment of this indebtedness.

(c-8) During the year 1916, when market conditions had greatly improved, the petitioner resold for the sum of $1,491,303.41 in cash, $740,000. of its First Preferred, $892,-930.62 of its Second Preferred and $1,715,692.02 of its Common Stock, a total of $3,348,622.64, thereby increasing the amount of the petitioner's outstanding stock, excluding that purchased and held in the treasury, to $11,000,000. This amount of stock remained outstanding during the years 1916 and 1917.

(c-9) The petitioner, erroneously considering that it was not entitled, under the law and existing regulations, to an amount in excess of the par value of the stock outstanding on December 31, 1916, as invested capital on account of property paid in for stock, reported $11,000,000. in its return for the year 1917 as the value on January 1, 1914, of the property paid in for the stock on December 1, 1913.

[fol. 142] (c-10) Upon information and belief, the respondent accepted as sufficient the evidence submitted establishing the value on January 1, 1914, of the properties paid in for the stock on December 1, 1913, as at least $11,000,000.

(c-11) The respondent erroneously determined, however, that the stock acquired by the petitioner on January 2, 1915, had been acquired for a consideration substantially less than par and that it was to be excluded in determining the par value of the stock originally issued for the property acquired on December 1, 1913, and thereupon erroneously reduced the amount of the par value of the stock originally issued for the property on December 1, 1913, to $7,651,-377.36, and limited the allowance for invested capital on account of the property paid in on December 1, 1913, to the par value of said stock as erroneously reduced.

(d-1) The petitioner filed its income and profits tax returns for the calendar year 1917 with the Collector of In-

ternal Revenue for the District of Alabama on or about the 15th day of April, 1918, which said returns were made in good faith and were not false or fraudulent with intent to evade the taxes. Said returns were thereafter audited by the respondent and an additional tax of $153,815.30, an alleged deficiency in the taxes reported in said returns, was assessed on or before April 29, 1921. Thereafter and on or about May 6, 1921, the petitioner filed with the Collector of Internal Revenue for the District of Alabama a claim for the abatement of said tax on the ground that, for the rea- [fol. 143] sons stated in said claim, the deficiency did not exist. The claim for abatement was erroneously rejected by the Commissioner of Internal Revenue on the 12th day of May, 1926. More than five years have elapsed since said returns were filed; the alleged deficiency has not been collected from the petitioner; no suit or proceeding for the collection of said deficiency was begun before the expiration of five years after the date when the returns were filed; and the petitioner has not consented in writing to a later collection of said alleged deficiency in tax.

6. The petitioner prays for relief from the deficiency asserted by the respondent and from payment of the taxes assessed in the following and each of the following particulars:

(a) That the petitioner be allowed as a deduction from its gross income for the year 1917, the sum of $47,021.82 as amortization of the cost to it of the lease (or stock) of Clinton Mining Company or as depletion or exhaustoin of the leased properties based upon the cost of $145,000.00; or;

(b) That the Clinton Mining Company be granted a reasonable allowance for the exhaustion or depletion of the leased properties based upon the March 1, 1913, value of the leasehold, and that the amount so allowed be deducted in computing the consolidated net income of the petitioner and Clinton Mining Company for the year 1917;

[fol. 144] (c) That the petitioner be allowed $11,000,000.00 in computing its invested capital for 1917, on account of the property paid in for stock on December 1, 1913;

(d) That the Board determine that the liability of the petitioner for the payment of the alleged deficiency has

been extinguished by the running of the Statute of Limitations upon its collection and/or that the collection of said alleged deficiency was barred at the expiration of five years after said returns were filed.

Wherefore petitioner prays that this Board may hear and determine the deficiency herein alleged.

(Signed) Henry V. Poor, (Signed) Stewart M. Seymour, (Signed) John Drye, Jr., Counsel for Petitioner. Office and P. O. address: 80 Broadway, New York City.

*Duly sworn to by A. R. Forsyth. Jurat omitted in printing.*

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[fol. 145] (EXHIBIT A)

Copy

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:E-60D. JHLT

May 12, 1926.

Gulf States Steel Company, Birmingham, Alabama

SIRS: Your claim for abatement of a deficiency in tax amounting to $153,815.30 assessed against you for the [fol. 146] taxable year 1917 has been carefully considered by this office, and it is proposed to allow the said claim for $0.00 and to reject it for $153,815.30, as computed upon the enclosed statement.

In accordance with the provisions of Section 283 (e) or Section 283 (k) of the Revenue Act of 1926, you are allowed 60 days (not counting Sunday as the sixtieth day) from the date of mailing of this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C., contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver

of your right to file a petition with the United States Board of Tax Appeals on the enclosed form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:E-JHLT-60. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Enclosures: Statement.

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[fol. 147] (EXHIBIT A-2)

(Copy)

Statement of Returns Examined and Resulting Tax Liability

Returns Examined

| Corporation | Year | Form |
|---|---|---|
| Gulf States Steel Company, Birmingham, Alabama | 1917 | 1031-1103 |

Tax Liability

| Name | Year | Claim in abatement |
|---|---|---|
| Gulf States Steel Company | 1917 | $153,815.30 |

The adjustments producing the above stated results were explained in a letter dated December 4, 1925.

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(EXHIBIT B)

IT:CR:E. JHLT

Gulf States Steel Company, Brown-Max Building, Birmingham, Alabama.

SIRS: Your claim for abatement of $153,815.30, additional income and excess profits tax for 1917, has been reexamined.

[fol. 148] The claim is based upon the following points:

(a) That property acquired for stock should be included in invested capital at its value as at January 1, 1914.

(b) The change in the percentage deduction from 8% to 7%.

(c) The Disallowance of interest paid as a part of invested capital.

A careful reexamination of the information submitted by you and other data on hand in this office discloses the following:

(a) Article 55 of Regulations 41 provides that tangible property paid in for stock or shares prior to January 1, 1914, must be valued as either (a) the actual cash value of such property on January 1, 1914 or (b) the par value of the stock or shares specially issued therefor, whichever is lower. The par value of the stock issued by you for property is less than the value of the property claimed by you. Therefore, the property received must be included in invested capital at the par value of the stock issued therefor.

(b) The information submitted by you discloses that your company was organized after January 2, 1913, therefore a rate of 8% is allowed to be used in computing the variable credit for excess profit tax purposes.

[fol. 149] (c) Information at hand indicates that the interest sought to be added to invested capital was claimed as deductions in computing net income for the years 1913 to 1916, inclusive. Your election to charge these items to expense during the years in which incurred constitutes a binding option. An election of this sort which was made concurrently with the transaction cannot now be revised. Article 64 of Regulations 41 provides that whenever a corporation has claimed and the department has allowed a deduction in respect to its income tax, the item upon which the deduction item is based shall not be restored to surplus account nor included in invested capital. Therefore the interest was correctly disallowed as an addition to invested capital.

A Tax liability in excess of that previously assessed has been found due, because of the disallowance of $55,987.10, depreciation on stock.

The claim will, therefore, be rejected.

The Collector of Internal Revenue for your district will be officially notified of the adjustment at the expiration of thirty days from the date of this letter unless prior to that date evidence is furnished showing the adjustment is incorrect.

Under no circumstances should payment of the amount rejected be made until a bill is received from the collector [fol. 150] of Internal Revenue for your district and remittance should then be made to him.

Respectfully, C. R. Nash, Assistant to the Commissioner, by (Signed) H. B. Robinson, Head of Division.

mlg-6.

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UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9276, 18358, 18359

[Title omitted]

MOTION FOR CONTINUANCE—Filed Feb. 21, 1927

Now comes the petitioner by its attorney, John W. Drye, Jr., and moves that the above entitled proceeding set for hearing on the day calendar for March 2, 1927, be consolidated for hearing with the appeals subsequently filed for the years 1917, docket No. 18358 and 1920 Docket 18359, and that the date of such hearing be continued for a period [fol. 151] of sixty days for the reason that similar issues are raised as to each of the years involved. Petitioner is solvent and is informed that the Commissioner of Internal Revenue has no objection to the granting of this motion.

(Signed) John W. Drye, Jr., Attorney for petitioner.
P. O. address: 80 Broadway, New York, N. Y.

(Filed Feb. 21, 1927.)
(Granted Feb. 24, 1927.)

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UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed Jan. 29, 1927

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of

Internal Revenue, and for answer to the petition of this [fol. 152] taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. (a) Admits that the respondent did not allow as a deduction in computing the net income of the petitioner for the calendar year 1917 the sum of $47,021.82 as amortization of the alleged cost to it of a lease of certain iron ore properties held in the name of Clinton Mining Company, or as amortization of the cost of the stock of the Clinton Mining Company, or as depletion or exhaustion of the leased properties, but denies that such action was in error.

4. (b) Admits that the respondent did not allow the Clinton Mining Company a reasonable allowance in 1917 for the amortization of the March 1, 1913, value of said lease or for the depreciation or exhaustion of the leasehold based upon the March 1, 1913, value thereof, but denies that such action was in error.

4. (c) Denies that the respondent erred as stated in paragraph 4 (c).

5. (a) 1. Admits that in 1909 the Clinton Mining Company acquired a lease of certain iron ore properties in [fol. 153] Jefferson County, Alabama, for a period beginning October 8, 1909, and ending January 31, 1925; that in 1916 the petitioner entered into negotiations with the Clinton Mining Company to acquire this leasehold interest to insure a supply of iron ore for use in the production and manufacture of pig iron, and that the petitioner purchased all of the capital stock of the Clinton Mining Company for which it paid $145,000 in cash.

Admits that the lease was worked out and the mine exhausted prior to January 31, 1925.

Admits that such other property in small amounts as was owned by the Clinton Mining Company at the time was paid at its inventory value, the price being in addition to the amount paid for the capital stock, and that the capital stock was transferred to the petitioner instead of the leasehold.

5. (a) 2. Admits that the mine was exhausted in November, 1921.

Denies that tonnage was recovered from December 1, 1916, the date of purchase of the stock of the Clinton Mining Company to the exhaustion of the mine in 1921 in the annual amounts alleged in paragraph 5 (a) 2 of the petition.

5. (a) 3. Denies the allegations set forth in paragraph 5 (a) 3.

5 (b) 1. Admits that the Clinton Mining Company as lessee of the ore properties is entitled to a reasonable al- [fol. 154] lowance for exhaustion or depletion of the leased properties based upon a March 1, 1913, value of the leasehold and that the amount allowable should be deducted in computing the consolidated net income of the petitioner and the Clinton Mining Company subject to the income and profits tax imposed by the Revenue Act of 1917.

Denies the allegations upon information and belief that the fair value of the lease on March 1, 1913, was at least $145,000 plus the amount paid for the ore extracted between March 1, 1913 and December 1, 1916.

5. (b) 2. Admits that no allowance has been made by the Commissioner to either of the affiliated companies for the exhaustion or depletion of the leased properties in computing the consolidated net income for 1917.

5. (c) 1. Admits that the petitioner was organized under the laws of the State of Delaware on November 1, 1913 and that the authorized capital stock was $15,500,000 divided into shares of the three classes of a par value of $100 per share as set forth in paragraph 5 (c) 1.

5. (c) 2. Admits that the petitioner on the first day of December, 1913, issued to the Standard Steel Company, an Alabama corporation, $15,500,000 of its capital stock ($15,- 500,000 of the stock being actually issued but $500,000 of the first preferred stock being simultaneously returned to [fol. 155] the treasury of the petitioner) in consideration of the transfer to the petitioner of the properties and current assets of the Standard Steel Company and the agreement of the Standard Steel Company to pay to the petitioner the sum of $1,981,887.50 in cash.

5. (c) 3. Denies the allegations set forth in paragraph 5 (c) 3.

5. (c) 4. Admits that the obligation of the Standard Steel Company to pay the $1,981,887.50 was secured by a pledge with the petitioner of the petitioner's capital stock so issued of a par value of $7,348,622.64.

5. (c) 5. Admits that of the $1,981,887.50 to be paid to the petitioner as per the aforementioned agreement, $1,000,000 was paid and the remaining $981,887.50 was to be paid by the Standard Steel Company on January 2, 1915.

5. (c) 6. Admits that $15,000,000 par value of the stock of the petitioner was outstanding on January 1, 1914, and remained outstanding until January 2, 1915 (the date of the maturity of the obligation of the Standard Steel Company to pay the $981,887.50 in cash).

Denies that the Standard Steel Company was without funds to liquidate this obligation on the due date and that there was no market at the time for securities of this nature, and denies further, that it was agreed that the amount of indebtedness could not be realized upon the sale [fol. 156] of the stock, and that the Standard Steel Company was without funds to pay any deficiency resulting from a sale made to satisfy the indebtedness.

5. (c) 7. Admits that an agreement was entered into between the petitioner and the Standard Steel Company whereby the indebtedness of $981,887.50 was cancelled in consideration of the transfer to the petitioner of its stock of the par value of $7,348,622.64 theretofore held by it as collateral security for the payment of this indebtedness.

5. (c) 8. Admits that during the year 1916 the petitioner resold for the sum of $1,491,303.41 in cash $740,000 of its preferred, $892,930.62 of its second preferred and $1,715,692.02 of its common stock, or a total par value of stock of $3,348,622.64, thereby increasing the amount of the petitioner's outstanding stock, excluding that purchased and held in the treasury, to $11,000,000, and that this amount of stock remained outstanding during the years 1916 and 1917.

5. (c) 9. Admits the allegations set forth in paragraph 5 (c) 9.

5. (c) 10. Denies the allegations set forth in paragraph 5 (c) 10.

5. (c) 11. Admits the allegations set forth in paragraph 5 (c) 11, excepting that portion which alleges the action of the Commissioner therein indicated to be in error. [fol. 157] Denies generally and specifically each and every allegation of error or of fact contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

(Signed) A. W. Gregg, by A., General Counsel, Bureau of Internal Revenue. of Counsel: William H. Lawder, Special Attorney, Bureau of Internal Revenue.

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UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

[Title omitted]

MOTION FOR EXTENSION OF TIME

The Commissioner of Internal Revenue requests an extension of one hundred and twenty days time, in addition to [fol. 158] the time allowed by the Board's Rules, within which to answer, or move in respect of, the petition of the above-named taxpayer.

(Signed) A. W. Gregg, by a General Counsel, Bureau of Internal Revenue. Of Counsel: William H. Lawder, Special Attorney, Bureau of Internal Revenue.

(Filed July 28, 1926.)
(Granted July 31, 1926.)

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UNITED STATES BOARD OF TAX APPEALS

Docket No. 18358

[Title omitted]

MOTION FOR EXTENSION OF TIME

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of In-

ternal Revenue, and moves for an extention of sixty days' time, in addition to the time allowed by the Board's rules, [fol. 159] and order of July 31, 1926, or from January 9, 1927 to March 10, 1927, within which to answer, or to move in respect of, the petition of the above named taxpayer.

(Signed) A. W. Gregg, General Co-nsul, Bureau of Internal Revenue. Of Counsel: William H. Lawder, Special Attorney, Bureau of Internal Revenue.

(Filed January 10, 1927.)
(Granted January 11, 1927.)

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UNITED STATES BOARD OF TAX APPEALS

Docket No. —

GULF STATES STEEL COMPANY, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION—Filed July 9, 1926

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the respondent [fol. 160] in his notice of deficiency under the provisions of Section 283 (e) or Section 283 (k) of the Revenue Act of 1926 (IT:C:E-JHLT-60-D) dated May 12, 1926, and as a basis of its proceeding alleges as follows:

1. The petitioner is a Delaware Corporation with its principal office in the Brown-Marx Building, Birmingham, Alabama.

2. Upon information and belief, the notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioner on May 12, 1926. A copy of the respondent's letter dated December 4, 1925, referred to therein, is attached hereto and marked "Exhibit B."

3. The taxes in controversy are income and profits taxes assessed for the calendar year 1917, and are more than $10,000, to-wit, $153,815.30.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The failure and refusal of the respondent to allow as a deduction in computing the net income for the calendar year 1917 subject to the income and profits tax imposed by the Revenue Act of 1917 the sum of $47,021.82 as amortization of the cost of it of a lease of certain iron ore properties held in the name of Clinton Mining Company, or as depletion or exhaustion of the leased properties; or, in the alternative:

[fol. 161] (b) The failure and refusal of the respondent to allow the Clinton Mining Company a reasonable allowance in 1917 for the amortization of the March 1, 1913, value of said lease or for depletion and exhaustion of the leasehold based upon the March 1, 1913 value thereof.

(c) The action of the respondent in reducing the invested capital of the petitioner on account of the acquisition by it of certain of its outstanding stock on January 2, 1915, in an amount greater than the cost to the petitioner of the stock so acquired.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a-1) In 1909, Clinton Mining Company acquired a lease of certain iron-ore properties, being all and singular the land described as the south half of the southeast quarter of Section twenty, Township eighteen, Range three, west (S. 1-2 of S. E. 1-4 of Sec. 20, Tp. 18, R. 3, W.), in Jefferson County, Alabama, containing eighty (80) acres, more or less, for a period beginning October 8, 1909, and ending January 31, 1925. In 1916, the petitioner entered into negotiations with Clinton Mining Company to acquire this leasehold interest to insure a supply of iron ore for use in the production and manufacture of pig iron. To accomplish the acquisition of the lease, the petitioner purchased all of the capital stock of the Clinton Mining Company, for which he paid $145,000 in cash. It was known at the time that the ore property covered by the lease would be entirely worked [fol. 162] out and the mine exhausted prior to January 31, 1925, the date of the expiration of the lease, and this in fact happened. Such other property, in small amounts, as was

owned by the Clinton Mining Company at the time was paid for at its inventory value, the price being in addition to the amount paid for the capital stock; the stock was transferred instead of the leasehold solely as a matter of convenience.

(a-2) The mine was exhausted in November, 1921, and thereafter abandoned. The actual tonnage recovered from December 1, 1916, the date the petitioner acquired the leasehold through the purchase of the stock of Clinton Mining Company, to the exhaustion of the mine was as follows:

| Year | Tons |
|---|---|
| 1916 | 13,031 |
| 1917 | 159,342 |
| 1918 | 109,222 |
| 1919 | 87,708 |
| 1920 | 63,323 |
| 1921 | 58,694 |
| Total | 491,320 |

(a-3) The actual recovery of 491,320 tons under the lease costing $145,000 shows a depletion rate of 29.51¢ per ton. Upon information and belief, the allowable deduction for depletion on account of the 159,342 tons mined in 1917 is $47,021.82. The amount of the deduction taken in the re- [fol. 163] turn as amortization of the cost of the lease (or stock) or as depletion or exhaustion of the leased properties based on the cost of $145,000 was only $39,987.49; it is erroneously stated in the respondent's letter of December 4, 1925, that the deduction taken in the return was $55,-987.10.

(b-1) If, however, it is held that the petitioner must charge off the total cost of said stock in the year in which the Clinton Mining Company was abandoned, then, Clinton Mining Company, as lessee of the ore properties, is entitled to a reasonable allowance for the exhaustion or depletion of the leased properties based upon the March 1, 1913 value of the leasehold, and the amount so allowed should be deducted in computing the consolidated net income of the petitioner and Clinton Mining Company subject to the income and profits tax imposed by the Revenue Act of 1917.

Upon information and belief, the fair value of the lease on March 1, 1913, was at least $145,000, plus the amount paid for the ore extracted between March 1, 1913 and December 1, 1916.

(b-2) No allowance has been made by the respondent to either of the affiliated Companies for the exhaustion or depletion of the leased premises in computing the consolidated net income for 1917.

(c-1) The petitioner was organized under the laws of the state of Delaware on November 1, 1913. The authorized capital stock was $15,500,000 ($15,000,000), divided into the following shares of three classes, par value $100 per share:

[fol. 164] $3,000,000 par value First Preferred Cumulative 7% stock.

$5,000,000 par value Second Preferred 6% non Cumulative stock.

$7,500,000 par value of common stock.

(c-2) The petitioner, on the first day of December, 1913, issued to Standard Steel Company, an Alabama Corporation, $15,500,000 of its capital stock ($15,500,000 of the stock was actually issued, but $500,000 of the First Preferred Stock was simultaneously returned to the treasury of the petitioner) in consideration of the transfer to it of the properties and current assets of the Standard Steel Company and the agreement of Standard Steel Company to pay to it the sum of $1,981,887.50 in cash, a consideration appraised for the petitioner by competent engineers employed for the purpose, prior to the issuance of the stock at $15,500,000.

(c-3) Title to the property of Standard Steel Company was thereupon transferred to the petitioner.

(c-4) The obligation of Standard Steel Company to pay the $1,981,887.50 was secured by a pledge with the petitioner of $1,240,000 of the First Preferred, $1,892,930.62 of the Second Preferred, and $4,215,692.02 of the Common Stock of the petitioner, a total of $7,348,622.64, which had been issued to Standard Steel Company as stated above.

[fol. 165] (c-5) Of the $1,981,887.50 to be paid to the petitioner, $1,000,000 was presently paid. The remaining

$981,887.50 was to be paid by Standard Steel Company on January 2, 1915.

(c-6) The $15,000,000 par value of stock of the petitioner was outstanding on January 1, 1914, and remained outstanding until January 2, 1915 (the date of the maturity of the obligation of Standard Steel Company to pay the $981,887.50 in cash above referred to). The Standard Steel Company was without funds to liquidate this obligation on the date due and there was no market at the time for securities of this nature. It was agreed that the amount of the indebtedness could not be realized upon the sale of the stock and that Standard Steel Company was without funds to pay any deficiency resulting from a sale made to satisfy the indebtedness.

(c-7) Thereupon an agreement was entered into between the petitioner and the Standard Steel Company whereby the indebtedness of $981,887.50 was cancelled in consideration of the transfer to the petitioner of its stock of the par value of $7,348,622.64 theretofore held by it as collateral security for the payment of this indebtedness.

(c-8) During the year 1916, when market conditions had greatly improved, the petitioner resold for the sum of $1,491,303.41 in cash, $740,000 of its First preferred, $892,-930.62 of its Second Preferred and $1,715,692.02 of its Common Stock, a total of $3,348,622.64. Thereby increasing the [fol. 166] amount of petitioner's outstanding stock excluding that purchased and held in the treasury, to $11,000,000. This amount of stock remained outstanding during the years 1916 and 1917.

(c-9) The petitioner, erroneously considering that it was not entitled, under law and existing regulations, to an amount in excess of the par value of the stock outstanding on December 31, 1916 as invested capital on account of property paid in for stock, reported $11,000,000 in its return for the year 1917 as the value on January 1, 1914 of the property paid in for the stock on December 1, 1913.

(c-10) Upon information and belief, the respondent accepted as sufficient the evidence submitted establishing the value on January 1, 1914 of the property paid in for stock on December 1, 1913, as at least $11,000,000.

(c-11) The respondent erroneously determined, however, that the stock acquired by the petitioner on January 2, 1915, had been acquired for a consideration substantially less than par and that it was to be excluded in determining the par value of the stock originally issued for the property acquired on December 1, 1913, and thereupon erroneously reduced the amount of the par value of the stock originally issued for the property on December 1, 1913, to $7,651,377.36, and limited the allowance for invested capital on account of the property paid in on December 1, 1913, to the par value of said stock as erroneously reduced.

[fol. 167] 6. The petitioner prays for relief from the deficiency asserted by the respondent and from payment of the taxes assessed in the following and each of the following particulars:

(a) That the petitioner be allowed as a deduction from its gross income for the year 1917, the sum of $47,021.82 as amortization of the cost to it of the lease (or stock) of Clinton Mining Company or as depletion or exhaustion of the leased properties based upon a cost of $145,000.00; or

(b) That the Clinton Mining Company be granted a reasonable allowance for the exhaustion or depletion of the leased properties based upon a March 1, 1913, value of the leasehold, and that amount so allowed be deducted in computing the consolidated net income of the petitioner and Clinton Mining Company for the year 1917:

(c) That the petitioner be allowed $11,000,000.00 in computing its invested capital for 1917, on account of the property paid in for stock on December 1, 1913.

Wherefore petitioner prays that this Board may hear and determine the deficiency herein alleged.

(Signed) Henry V. Poor, (Signed) Stewart M. Seymour, (Signed) John Drye, Jr., Counsel for Petitioner. Office and P. O. address: 80 Broadway, New York City.

[fol. 168] *Duly sworn to by A. R. Forsyth. Jurat omitted in printing.*

(Exhibit A)

Copy

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:E-60D. JHLT

May 12, 1926.

[fol. 169] Gulf States Steel Company, Birmingham, Alabama.

Sirs: Your claim for abatement of a deficiency in tax amounting to $153,815.30 assessed against you for the taxable year 1917, has been carefully considered by this office, and it is proposed to allow the said claim of $0.00 and to reject it for $153,815.30, as computed upon the enclosed statement.

In accordance with the provisions of Section 283 (c) or Section 283 (k) of the Revenue Act of 1926, you are allowed 60 days (not counting Sunday as the sixtieth day) from the date of mailing of this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C., contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: CR:E-JHLT-60D. In the event that you acquiesce in a part of the determi-
[fol. 170] nation, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Enclosures: Statement.

(Exhibit A-2)

Copy

Statement of Returns Examined and Resulting Tax Liability

Returns Examined

| Corporation | Year | Form |
|---|---|---|
| Gulf States Steel Company, Birmingham, Alabama | 1917 | 1031-1103 |

Tax Liability

| Name | Year | Claim in abatement |
|---|---|---|
| Gulf States Steel Company | 1917 | $153,815.30 |

The adjustments producing the above stated results were explained in a letter dated December 4, 1925.

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[fol. 171] (Exhibit B)

IT:CR:E. JHLT

Dec. 4, 1925.

Gulf States Steel Company, Brown-Marx Building, Birmingham, Alabama.

Sirs: Your claim for abatement of $153,815.30, additional income and excess profit tax for 1917, has been reexamined. The claim is based upon the following points:

(a) That property acquired for stock should be included in invested capital at its value as at January 1, 1914.

(b) The change in the percentage deduction from 8% to 7%.

(c) The disallowance of interest paid as a part of invested capital.

A careful reexamination of the information submitted by you and other data on hand in this office discloses the following:

(a) Article 55 of Regulation 41 provides that tangible property paid in for stock or shares prior to January 1, 1914, must be valued as either (a) the actual cash value of such property on January 1, 1914, or (b) the par value of the stock or shares specially issued therefor, whichever [fol. 172] is lower. The par value of the stock issued by you for property is less than the value of the property claimed by you. Therefore, the property received must be included in invested capital at the par value of the stock issued therefor.

(b) The information submitted by you discloses that your company was organized after January 2, 1913, therefore a rate of 8% is allowed to be used in computing the variable credit for excess profit tax purposes.

(c) Information at hand indicates that the interest sought to be added to invested capital was claimed as deductions in computing net income for the years 1913 to 1916, inclusive. Your election to charge these items to expense during the years in which incurred constitutes a binding option. An election of this sort which was made concurrently with the transaction cannot now be revised. Article 64 of Regulations 41 provides that whenever a corporation has claimed and the department has allowed a deduction in respect to its income tax, the item upon which the deduction is based shall not be restored to surplus account nor included in invested capital. Therefore the interest was correctly disallowed as an addition to invested capital.

A tax liability in excess of that previously assessed has been found due, because of the disallowance of $55,987.10, depreciation on stock.

[fol. 173] The claim will, therefore, be rejected.

The Collector of Internal Revenue for your district will be officially notified of the adjustment at the expiration of thirty days from the date of this letter unless prior to that date evidence is furnished showing the adjustment is incorrect.

Under no circumstances should payment of the amount rejected be made until a bill is received from the Collector

of Internal Revenue for your district and remittance should then be made to him.

Respectfully, C. R. Nash, Assistant to the Commissioner, by (Signed) H. B. Robinson.

Mlg-6.

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The above was all the evidence in the case.

The court delivered no oral charge to the jury.

REQUESTED CHARGES TO JURY

Thereupon defendant Gulf States Steel Company requested in writing the following charge:

"1. If the jury believe the evidence, they must find for the defendant Gulf States Steel Company."

This charge the court refused to give and wrote thereon "Refused. W. I. Grubb, District Judge." To this action defendant Gulf States Steel Company excepted.

[fol. 174] Thereupon National Surety Company requested in writing the following charge:

"2. If the jury believe the evidence they must find for the defendant National Surety Company."

This charge the court refused to give and wrote thereon "Refused. W. I. Grubb, District Judge." To this action defendant Gulf States Steel Company excepted.

Thereupon the defendants Gulf States Steel Company and National Surety Company requested in writing the following charge:

"3. If the jury believe the evidence, they must find for the defendants."

This charge the court refused to give and wrote thereon "Refused. W. I. Grubb, District Judge." To this action defendants excepted.

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VERDICT

Thereupon the jury retired and then brought in the following verdict, to-wit:

"We, the jury, find for the plaintiff and assess its damages as $209,998.02.

J. M. Ellis, Foreman."

**Thereupon on, to-wit, May 14, 1931, defendants made and presented to the court the following motions for a new trial:**

[fol. 175] In United States District Court for the Southern Division of the Northern District of Alabama

"United States of America, Plaintiff,

vs.

Gulf States Steel Company and National Surety Company, Defendants

Motion for New Trial

"Comes the defendant National Surety Company and moves the court to grant it a new trial on the following grounds:

"1. The court erred in sustaining the demurrers of the plaintiff to this defendant's second plea.

"2. The court erred in refusing to give the affirmative charge to this defendant requested in writing by it."

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[fol. 176] In United States District Court for the Southern Division of the Northern District of Alabama

"United States of America, Plaintiff,

vs.

Gulf States Steel Company and National Surety Company, Defendants

Motion for New Trial

"Comes the defendant Gulf States Steel Company and moves the court to grant it a new trial on the following grounds:

"1. The court erred in sustaining the demurrers of the plaintiff to this defendant's second plea.

"2. The court erred in refusing to give the affirmative charge to this defendant requested in writing by it."

Said motions were duly heard by the court and were on, to-wit, June 5, 1931, overruled, to which action of the court defendants reserved an exception.

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ORDER SETTLING BILL OF EXCEPTIONS

The above and foregoing bill of exceptions taken by the defendants, Gulf States Steel Company and National Surety Company, was presented to the court on the 29th day of June, 1931 and is by the Honorable William I. Grubb, Judge of said court, signed as a true bill of exceptions, this 29th day of June, 1931.

W. I. Grubb, District Judge.

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[fol. 177] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 3723

UNITED STATES OF AMERICA, Plaintiff,

vs.

GULF STATES STEEL COMPANY and NATIONAL SURETY COMPANY, Defendants

STIPULATION AS TO TESTIMONY

It is hereby stipulated and agreed that on the hearing before the United States Board of Tax Appeals of the petition of Gulf States Steel Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 18358, the petitioner produced A. R. Forsyth and William H. Coverdale, who testified in respect of the issue raised by the allegations of paragraph 4 (c) of the amended petition, and produced A. R. Forsyth to testify in respect of the issues raised by the allegation of paragraph 4 (d) of the petition, and that the testimony of said witnesses given before the United States Board of Tax Appeals, together with the briefs filed by the parties was included in the volume containing certified copies of the docket entries,

[fol. 178] pleadings, testimony, etc., in Docket No. 18358, before the United States Board of Tax Appeals, introduced in evidence in this case, but may be omitted from the printed record on appeal in this case.

(Signed) John B. Isbell, Attorneys for Plaintiff.
(Signed) Benners, Burr, McKamy & Forman, Attorneys for Defendants.

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IN UNITED STATES DISTRICT COURT

No. 3723

[Title omitted]

PETITION FOR APPEAL—Filed June 29, 1931

To the Honorable William I. Grubb, Judge of said Court:

[fol. 179] Now comes Gulf States Steel Company and National Surety Company, the defendants in the above entitled cause, by Benners, Burr, McKamy & Forman, their attorneys, and state that the said cause is one in which, under legislation in force when the Act of January 31, 1928, c. 14, 45 Stat. —, was passeed, a review of the final judgment entered on the 1st day of May, 1931, could be had on writ of error by the United States Circuit Court of Appeals for the Fifth Circuit; and conceiving themselves aggrieved by the said final judgment entered on said date, do hereby pray that an appeal may be allowed to them from the said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, and, in connection with this petition, herewith present their assignment of errors and prayer for reversal.

Petitioners further pray that citation may issue and that a duly authenticated transcript of the pleadings, exhibits, bill of exceptions, record and proceedings upon which said judgment was made may be transmitted to the said United States Circuit Court of Appeals for the Fifth Circuit, as provided by law, and that an order be made fixing the amount of bond which defendant Gulf States Steel Company shall give and furnish upon said appeal, and directing that upon the giving of such security, all further proceedings in this court be suspended and stayed until the final determina-

[fol. 180] tion of said appeal, the plaintiff having waived supersedeas as to National Surety Company.

And your petitioners will ever pray.

This 29th day of June, 1931.

(Signed) Benners, Burr, McKamy & Forman, Attorneys for Defendants.

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IN UNITED STATES DISTRICT COURT

No. 3723

UNITED STATES OF AMERICA, Plaintiff,

vs.

GULF STATES STEEL COMPANY and NATIONAL SURETY COMPANY, Defendants

ORDER ALLOWING APPEAL—Filed June 29, 1931

On this the 29th day of June, 1931, came the defendants, Gulf States Steel Company and National Surety Company, by their attorneys, Benners, Burr, McKamy & Forman, [fol. 181] and filed herein and presented to the court their petition (together with assignment of errors and prayer for reversal filed therein), praying for the allowance of an appeal from the judgment entered by this court on the 1st day of May, 1931, to the United States Circuit Court of Appeals for the Fifth Circuit, and praying also that citation may issue and that a duly authenticated transcript of the pleadings, exhibits, bill of exceptions, record, and proceedings upon which such judgment was made, be transmitted to said United States Circuit Court of Appeals, as provided by law, and that the amount of the appeal bond be fixed, and the court having considered the same:

It is hereby ordered that said appeal be and the same hereby is allowed as prayed in said petition;

It is hereby further ordered that a duly authenticated transcript of the pleadings, exhibits, bill of exceptions, record and proceedings in this cause, upon which said judgment was made, be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit;

It is hereby further ordered that the amount of the bond on said appeal be and hereby is fixed at $230,000, and that upon the filing of a bond in that amount, with the Gulf State Steel Company, as principal, execution and all proceedings [fol. 182] herein be stayed until the coming in of the mandate of said United States Circuit Court of Appeals.

W. I. Grubb, District Judge.

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IN UNITED STATES DISTRICT COURT

No. 3723

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 29, 1931

Now come Gulf States Steel Company and National Surety Company, the defendants in the above entitled cause, and jointly and separately assign errors upon the trial of this cause in the United States District Court for the Southern Division of the Northern District of Alabama, as follows:

First. The court erred in sustaining the plaintiff's demurrer to plea numbered two filed by defendant Gulf States [fol. 183] Steel Company in that it was alleged in said plea in substance that the bond sued on provided that "if the principal or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, together with penalties and interest thereon, as provided by law, then this obligation shall be of no effect," and that the claim for taxes had been abated and the bond had become of no binding effect on the defendants.

Second. In other respects, the court erred in sustaining the plaintiff's demurrer to plea numbered two filed by defendant Gulf States Steel Company.

Third. The court erred in sustaining the plaintiff's demurrer to plea numbered two filed by defendant National Surety Company in that it was alleged in said plea in substance that the bond sued on provided that "if the principal

or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, together with penalties and interest thereon, as provided by law, then this obligation shall be of no effect," and that the claim for taxes had been abated and the bond had become of no binding effect on the defendants.

Fourth. In other respects, the court erred in sustaining the plaintiff's demurrer to plea numbered two filed by defendant National Surety Company.

Fifth. The court erred in refusing to give the following charge requested in writing by the defendant Gulf States [fol. 184] Steel Company and wrote thereon: "Refused. W. I. Grubb, District Judge."

"1. If the jury believe the evidence they must find for the defendant Gulf States Steel Company."

Sixth. The court erred in refusing to give the following charge requested in writing by the National Surety Company, and wrote thereon: "Refused. W. I. Grubb, District Judge".

"2. If the jury believe the evidence, they must find for the defendant National Surety Company."

Seventh: The court erred in refusing to give the following charge requested in writing by the defendants Gulf States Steel Company and National Surety Company, and wrote thereon: "Refused. W. I. Grubb, District Judge".

"3. If the jury believe the evidence, they must find for the defendants."

Eighth: Among other reasons, the court erred in refusing the above requested charges in that the defendants' evidence was to the effect that the bond sued upon provided that "if the principal or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, together with penalties and interest thereon, as provided by law, then this obligation shall be of no effect," and that the claim for taxes had been abated and the bond had [fol. 185] become of no binding effect on the defendants.

Ninth. The court erred in entering judgment for the plaintiff.

Tenth. The court erred in denying defendants' motion for a new trial, in that it conclusively appeared on the trial that the bond sued on provided that "if the principal or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, together with penalties and interest thereon, as provided by law, then this obligation shall be of no effect," and that the claim for taxes had been abated and the bond had become of no binding effect on the defendants.

Eleventh. In other respects, the court erred in denying defendants' motion for a new trial.

Twelfth. The court erred in admitting over the objection of the defendants the bond of which a copy is made Exhibit "A" to the complaint.

Thirteenth. The court erred in admitting over the objection of the defendants the bond of which a copy is made Exhibit "B" to the complaint.

Wherefore the said defendants-appellants pray that the judgment of the said District Court in this cause, entered on the 1st day of May, 1931, be reversed and judgment [fols. 186 & 187] directed for the defendants herein.

(Signed) Benners, Burr, McKamy & Forman, Attorneys for Defendants.

Presented this June 29th, 1931.

W. I. Grubb, District Judge.

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Bond on appeal for $230,000, approved and filed June 29, 1931, omitted in printing.

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[fols. 188 & 189] Clerk's certificate to foregoing transcript omitted in printing.



That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 6325

GULF STATES STEEL COMPANY and NATIONAL SURETY COMPANY

versus

UNITED STATES OF AMERICA

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 19th, 1932

On this day this cause was called, and, after argument by John W. Drye, Jr., Esq., and Augustus Benners, Esq., for appellants, and John B. Isbell, Esq., United States Attorney, and C. C. McCormick, Esq., Special Attorney, Bureau of Internal Revenue, for appellee, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6325

GULF STATES STEEL COMPANY and NATIONAL SURETY COMPANY, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Northern District of Alabama

(February 19, 1932)

Before Bryan, Sibley, and Hutcheson, Circuit Judges

OPINION OF THE COURT AND DISSENTING OPINION OF SIBLEY, CIRCUIT JUDGE—Filed February 19, 1932

HUTCHESON, Circuit Judge:

This is an appeal from a verdict and judgment that appellants had breached the conditions of and were liable on

a bond executed September 9, 1925, to stay the collection, pending disposition of a claim for its abatement, of an additional assessment made by the Commissioner in April 1921 for the year 1917. This bond, conditioned "that the principal or surety, or both, shall pay to the Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon, as provided by law" recited the assessment of the additional tax, the filing of claim for abatement, the prior execution of a bond by the Gulf States Steel Company securing the payment "of so much of the additional assessment, penalties and interest as is not abated," and the deposit of Liberty Loan bonds as security.

The appeal presents the single question whether the finding by the Board of Tax Appeals on a petition for redetermination of deficiency filed after the Commissioner had rejected the taxpayer's claim for abatement, that "there is no deficiency for the year 1917, because the statutes of limitation have run against the collection," abated the additional assessment within the meaning of the bond.

The District Judge concluded that it did not. He was of the opinion that the finding of the Board had the effect not at all of abating any part of the tax, but of formally declaring that, because barred, it was not collectible. He was of the opinion that the finding of the Board that limitation had run added nothing to the fact that it had, and that the case was ruled by United States vs. John Barth Co., 279 U. S. 370. We are of the same opinion. That case held "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. * * * The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood, and no bond been given," p. 375, and that "the object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought." p. 376.

Appellants insist that by the different conditions in the bonds there is a great gulf fixed between this and the Barth case. That in the Barth case the agreement, which was to

pay "any part of such tax found by the Commissioner to be due" was breached because the Commissioner did find an amount due, and there was no recourse from his finding; that the agreement in this case is to pay "so much of the amount of the claim as is not abated" and that it was all abated. We think the language of the two bonds is, in legal effect, the same; the only difference is that one speaks affirmatively, the other negatively. The Barth bond was in words an agreement to pay what was found to be due. The bond here was in effect the same, for it was an agreement to pay all but what was found not due. In the Barth case a part only of the tax was found to be due; here it all was.

The Commissioner considered and rejected all claims set up against the assessment. Finding it to have been duly made, he was without power to, and he did not, abate any of it. The Board, under the jurisdiction which is the only one it has under the statutes to re-determine deficiencies asserted by the Commissioner, (Appeal of Morefield, 4 B. T. A. 394) was at first petitioned to review the findings of the Commissioner and to determine that the assessment had not, in whole or in part, been duly laid. If it had done so, that determination would have, to the extent the assessment was found invalid, have resulted in an abatement of the tax. It did not however, do this; instead it confined its attention to and based its finding of no deficiency on the point raised in the amended petition filed March 4, 1927, that "the payment of the alleged deficiency had been extinguished by the running of the statutes of limitation, and that collection of such deficiency was barred." This is not a finding that the tax or any part of it should be abated. It does not abate any part of it. It is but a formal judgment that the tax, as tax, is, because the bar of limitation has fallen, not collectible. Since it is this and no more, it has the effect upon the suit on the bond here and no more, that the fact found in the Barth case and the legal conclusion there announced, that time had run against the tax and that it was therefore uncollectible, had on the suit on the bond there.

A brief statement of the facts of this case which are undisputed, and as brief a consideration of the meaning of "abated" used in the bond, will we think, suffice to show the correctness of these conclusions.

The Gulf States Steel Company, hereafter called "the company," made its return of assessment for 1917 on March 22, 1918. In April 1921 the Commissioner made the additional assessment of $153,815.30 which furnishes the spring of the controversy here. On May 6, 1921, the Company on Form 47, revised April 1918 filed claim for abatement taxes erroneously and illegally assessed. This claim demanded the abatement of the additional assessment on the ground "that said additional assessment is unwarranted and illegal" in the respects that it incorrectly computed invested capital, allowed a deduction of only 7% instead of 8%, and disallowed as invested capital, certain interest paid." On March 13, nine days before the five years after the return was made had run, upon demand of the Tax Collector for payment, the Company and the American Surety Company executed a bond in favor of the Collector in the sum of $175,350.00 conditioned that the contractors "will indemnify the Collector against all loss, costs, damage and expense to which he may be put by reason of having allowed the Gulf States Steel Company to withhold the payment to him of the sum of $153,815.30 claimed due by it under the War Revenue Act of 1917 pending the filing of additional facts and information in support of claim for abatement of said amount heretofore filed by it." On April 23, 1925 the Company executed an agreement which after reciting that it and the American Surety Company had executed the bond above in support "of a claim for abatement of assessment, penalties and interest" and that it was desirous of relieving the above bound surety and further securing the payment of any amount due, pledged with the Collector $200,000 of Liberty bonds, and obligated the undersigned "to pay to the Collector such amount of the claim as is not abated, together with all costs, damages, penalties and interest." On September 9, 1925, appellants executed the bond sued on here, which after reciting the assessment of the additional income tax for the year 1917, that a claim for the abatement of the additional tax was filed with the Collector, the execution of the bond of April 3, 1925, and the deposit in lieu of surety of Liberty bonds, obligated the Collector to release and surrender the Liberty bonds to the Company, and the appellants to "pay to the Collector so much of the amount

of the claim as is not abated, together with penalties and interest thereon."

On May 12, 1926, the claim for abatement was rejected by the Commissioner. The Company, notified that it had sixty days within which to file a petition with the Board of Tax Appeals for a re-determination of the deficiency assessment, filed its petition attacking the assessment as not duly laid. In July, 1928, the Board disposed of the matter on the plea of limitation set up in the amended petition. It found that "the collection of the deficiency, if any, in income and excess profits taxes for the year 1917 is barred by the statutes of limitation, and there is no deficiency for that year."

Appellants, taking their definition of "abate" from Webster, "7 Law. (a) To bring entirely down or demolish; to put an end to; to do away with, as to abate a nuisance; to abate an action. (b) To nullify; to make void" declare that that is what has occurred here. The Board has demolished and done away with the tax, therefore it has abated it.

We think appellants' erroneous view of this case springs from the error into which they have fallen here, of giving to the word "abate" the meaning generally attached to it in legal proceedings of a quashal, a meaning which in its context and as applied to the subject matter dealt with here, it does not have. Carrying always the general meaning of "to reduce; lessen, diminish" the word "abate" has many shades of meaning, both in general usage and in law. It is a technical word applicable to and used in many relations, and like all such words, it takes its color and content from the context of the subject matter with which it deals. Webster's International Dictionary; Bouvier Rawles 3rd Revision, Vol. 1. As applied to taxation, the subject with which this bond is precisely concerned, it has and has long had, a clear and definite meaning.

"An abatement supposes the assessment not duly made. If the tax be wholly abated, it is as if no assessment had been made, and if the tax be partially abated, and the residue paid, then all that has been duly assessed has been paid;" Billerica vs. Chelmsford, 10 Mass. 396.

"It presupposes some error or mistake in the assessment, and is to be made on application of the party ag-

grieved who has been assessed beyond his due proportion. * * * It is an authority to the assessor to amend an erroneous assessment, and when such assessment is made, it is the diminished and collectible tax, and not the erroneous one, which the law considers to be the tax duly assessed." 19 Pickering, 390.

This is the nature and position of proceedings in abatement of internal revenue taxes. They assume, indeed the forms used declare, that the taxes claimed have been illegally and erroneously assessed. They seek in advance of compulsory payment to have this determined and the assessment amended. They seek, they expect, no relief, except that which flows from a finding that the assessment has in whole or in part, not been duly made. They are not appropriate to, they do not present, matters of defense to the collection of the tax They have no force in themselves to defend or stay it. They do go, however to the very root of the assessment, denying that it has been duly made, and seeking its amendment. The filing of such claims though diminishing under the Revenue Acts of 1921 and 1924, and practically non-existent under those of 1926 and 1928, has long been a familiar practice in connection with the collection of income taxes. Montgomery on **Income Tax Procedure**, p. 268 et seq. Holmes, Federal Taxes, 6 Ed., Sec. 806-816-817, 907 and 908. It has had no function, no effect, except to stay collection while the correctness of the assessment is being re-examined, in order to save the Government and taxpayer alike from the nuisance of having to pay a tax, erroneously assessed, only to recover it back again by suit. In jeopardy cases, and in many others where abatement claims like the one in question here have been filed, bonds have been given. Holmes, Federal Taxes, 6 Ed., Sec. 801; neither the filing of the claim nor the giving of the bond prevents time from running against the collection of the tax as such, nor do they preserve any remedy which but for the bar, might be available to collect the tax. Bowers vs. N. Y. & Albany, 273 U. S. 346; Russell vs. U. S., 278 U. S. 181. The pendency of such claim did not prevent the Collector from proceeding with the collection of the tax, or the taxpayer from paying the tax and thereafter in a suit for its return, raising the question not only as to the amount of tax due, but as to the bar of time.

Graham vs. Dupont, 262 U. S. 257. The giving of the bond, however, did create a new right in the Government upon which, wholly apart from the tax, it may sue. U. S. vs. John Barth Co., supra. It is upon this contract right, and not for the tax, that the Government now sues.

The record shows not only no finding that the assessment referred to in the bond was illegal or erroneously laid, but an affirmative finding by the Commissioner not reversed by the Board, that it was not. Defendants are liable on their bond.

The judgment is affirmed.

SIBLEY, Circuit Judge, dissenting:

While I think the taxpayer, Gulf States Steel Company, is liable on the first bond given, it and National Surety Company, which signed the third bond only, are not liable on that bond. The surety on the first bond was released in consideration of the signing of the second, but the first bond was not surrendered but held against the principal, and the second expressly states that it was to "further secure the payment of the amount found to be due the United States." The third bond does not mention the first at all and does not supersede it. The first bond is conditioned "that the Gulf States Steel Company will indemnify the Collector or his successor in office against all loss, cost, damage and expense to which he may be put by reason of having allowed the said Company to withhold payment to him as such Collector of the named tax pending the filing of additional facts and information in support of a claim for abatement of said tax heretofore filed by it." It having been established that by reason of this delay the Collector lost the entire tax he is by the plain words of this bond entitled to indemnification under it.

As concerns the taxpayer there is a rough justice in saying that since for its benefit the Liberty Bonds were put in the place of the liability of the surety on the first bond, and the liability of the surety on the third bond was put in the place of the Liberty Bonds, therefore the third bond should stand for the same purposes as the first. But this is neither accurate nor right as to the National Surety Company. Its relation to the United States is purely that of surety for another, and its obligation is therefore one of strict law and measured solely by the bond it signed, fairly

interpreted. This bond makes no reference to the first bond, whose terms may have been wholly unknown. It is for a different penalty, and given not to procure delay but the release of the Liberty Bonds belonging to the taxpayer. It was not intended to express the same obligation that the first bond did, because its condition is wholly different from that of the first bond. After mentioning the assessed additional tax and the pending claim for abatement, and the giving of the second bond secured by the Liberty Bonds which were to be surrendered, it binds the surety "to pay to said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by law." The question is, what do these words fairly mean when used in this connection in 1925? This is a voluntary bond, not taken in pursuance of any statute, but it happens to be in the language provided in the Revenue Act of 1924, § 279 (a), for bonds given to stay jeopardy assessments. Its language also is substantially that prescribed by Revenue Act of 1928, § 273 (f), and is likely to be used in any bond given in connection with a claim for abatement, and its proper construction is important. The case of John Barth Company vs. United States, 279 U. S. 370, is not controlling. That case settled that the bar of limitation falling upon a tax after the giving of a bond made to obtain delay does not affect the contractual liability on the bond. It was said of the statutory bond there involved:

"The object of the bond was not only to prevent the immediate collection of the tax, but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to make good the contract by which he obtained the delay he sought."

This language applies to the first bond in this case, which was given to obtain and did obtain the delay which ripened the limitation. Had the condition of that bond been less aptly worded and more like that of the third bond I should be prepared to hold that the makers of it were estopped to defeat their bond on account of the very thing they were to obtain by giving it. Such could not be the fair intention of the parties. But the third bond was given two years and six months after the limitation bar had occurred. It does

not stipulate for any delay, and if any was had on the faith of it the delay is amply compensated by the penalties and interest promised to be paid. Moreover the surety on it is not refusing to make good his contract, but only asking that it be enforced according to its terms. The promise is to pay what is not abated. I do not regard as important the language quoted in the majority opinion from 19 Pickering, 390, concerning the tax laws of Massachusetts a hundred years ago. The point in that case was whether a pauper could claim support from a township as having theretofore paid five years' taxes when in fact some of them had been forgiven him. No question of abatement by limitation was involved. If it be true that in Massachusetts jurisprudence abatement refers only to error or mistake in an assessment and not to remission of taxes, the contrary is true in the Federal jurisprudence. In R. S., § 2984 and § 3221, the Secretary of the Treasury was authorized in certain cases to remit taxes duly and properly assessed on imported merchandise or distilled liquors which were afterwards accidentally destroyed. In both sections the remission before payment, although not for any error in the assessment, is termed an abatement, and after payment a refund; and the Supreme Court uses the word "abate" in that meaning in United States v. Alexander, 110 U. S. 325. A tax may therefore properly be said to be abated not only for errors and mistakes in its assessment, but for matters arising afterwards and before its collection. Limitation, whether occurring before or after assessment, was not known until recently as a ground for abatement because limitation did not exist. It was first provided as to assessing deficiencies in income taxes by requiring error to be discovered within three years. A claim for abatement with this limitation as its ground was involved in Graham v. Du Pont, 262 U. S. 234, and apparently filed so early as 1920. The Revenue Act of 1924 established the Board of Tax Appeals as a part of the machinery for assessing deficiencies and correcting assessments theretofore made. Among its earliest decisions is that of National Refining Company, 1 B. T. A. 236, decided Dec. 23rd, 1924, holding that the limitations of the Acts of 1918 and 1924 must be noticed in redetermining deficiencies. It was said:

"Nowhere does the Act contain any limitation on the Board as to what it may consider in determining whether

or not a deficiency in tax exists. There is no restriction on the taxpayer's asserting in his appeal that such tax is in violation of the Constitution, or in violation of the provisions of any of the Revenue Acts, or illegal for any other reason. There is no more cause to prevent its pleading § 277 (a) (2) of the Revenue Act of 1924 as a reason why a deficiency should not be determined against it than there is to deny it the right to plead any other section of the Act." "It appears to be clearly evident that the plea of limitation raises a distinct question as to the liability of the taxpayer for the tax. It is also evident that Congress intended this Board to determine any liability of any taxpayer appealing to it regarding a deficiency imposed, prior to payment of the tax."

The ruling was repeated in John W. Collinson, 1 B. T. A. 561, and has been adhered to ever since. Those cases related to determinations made before assessment, but the principle was applied to this very claim for abatement where assessment had been made before notice under the old practice. 12 B. T. A. 1244. It is worthy of note that Revenue Act of 1928, § 273 (f), speaks of any adverse decision of the Board of Tax Appeals as one abating a tax. Its decision is the final judgment of the executive department upon an assessment whether contemplated or under review, superseding and controlling that of the Commissioner. 26 U. S. C. A. 1048 (a). When this bond, therefore, was given, limitation as well as error in the assessment was a ground for abating before payment a claim for taxes that was recognized by the Tax Department of the Government. When the bond referred to a pending claim for abatement and promised payment of such sum as is not abated, it had plain reference to the final action by the Tax Department which included action by the Board of Tax Appeals on that claim for abatement. It is true that limitation was not at that time named in the claim as a ground for abatement, but it existed and might be added by amendment. Limitation must be considered if urged at any time before the final decision of the Board. Almeda Park v. Commissioner, 37 Fed. (2d), 805; Gueder-Paeschke & Frey Co. v. Commissioner, 41 Fed. (2d), 308; Enamel Metals Co. v. Commissioner, 42 Fed. (2d), 213; Excelsior Motor Mfg. Co. v. Commissioner, 43 Fed. (2d), 968. When

the validity of this ground for abatement was established by the decision on Feb. 21st, 1927, in Bowers vs. New York & Albany Co., 273 U. S. 346, there was no estoppel against and no impropriety in urging it. The Board of Tax Appeals so held, and abated the whole deficiency assessment because of limitation, declining to pass on the other grounds urged for abatement. No part of the tax claim remained unabated, so that there is nothing to be paid under the terms of the bond. The distinction to be taken is between a limitation which ripens after the giving of the bond by reason of delay obtained through the bond, and a limitation which ripened before. The former because of estoppel cannot be taken advantage of to defeat a bond worded like this one, but the latter may. A different ruling forfeits the defense of limitation already accrued on giving the statutory bonds above referred to. The taxing department of the Government by a decision on the ground of limitation and a refusal to decide the other grounds cannot deprive this surety of the benefit that might have resulted from a consideration of the latter. That Department in the regular exercise of its functions having completely abated the deficiency claimed because of a limitation antedating the bond, nothing ought to be exacted under its promise to pay such amount as is not abated. I express no opinion as to whether the present pleadings suffice to assert the liability of the taxpayer under its first bond, but I dissent from the judgment upholding liability of principal and surety under the third bond.

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No. 6325

GULF STATES STEEL COMPANY and NATIONAL SURETY COMPANY

versus

UNITED STATES OF AMERICA

JUDGMENT

Extract from the Minutes of February 19th, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Northern District of Georgia, and was submitted to the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Sibley, Circuit Judge, dissenting.

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MOTION AND ORDER STAYING MANDATE—Filed March 4th, 1932

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 6325

GULF STATES STEEL COMPANY and NATIONAL SURETY COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

Petition of Appellants for Order Staying Execution of Judgment to Enable Appellants to Apply for Writ of Certiorari

To Judge of the United States Circuit Court of Appeals for the Fifth Circuit:

Gulf States Steel Company and National Surety Company, appellants in the above cause, respectfully present this application, under the provisions of Section 350 of Title 28 of the United States Code, for an order staying the execution and enforcement of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, rendered in the above cause on the 19th day of February, 1932, to enable appellants to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

This application is made on the ground that it is the bona fide intention of appellants to apply to the Supreme Court of the United States for writ of certiorari in this case, within the time required by law. Appellants are advised

and believe that there is merit in their cause and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit ought to be reversed by the Supreme Court of the United States. The petition will not be filed for the purpose of delay.

(Signed) Augustus Benners (Augustus Benners),
Counsel for Appellants.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6325

GULF STATES STEEL COMPANY and NATIONAL SURETY COMPANY, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

On consideration of the application of the appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 4th day of March, 1932.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

122

## Clerk's Certificate

United States of America:

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 190 to 206 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 6325, wherein Gulf States Steel Company and National Surety Company are appellants, and the United States of America is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 189 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 5th day of March, A. D. 1932.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 204] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 25, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 36,635. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 821. Gulf States Steel Company and National Surety Company, petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 23, 1932. File No. 36,635.



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IN THE

# Supreme Court of the United States

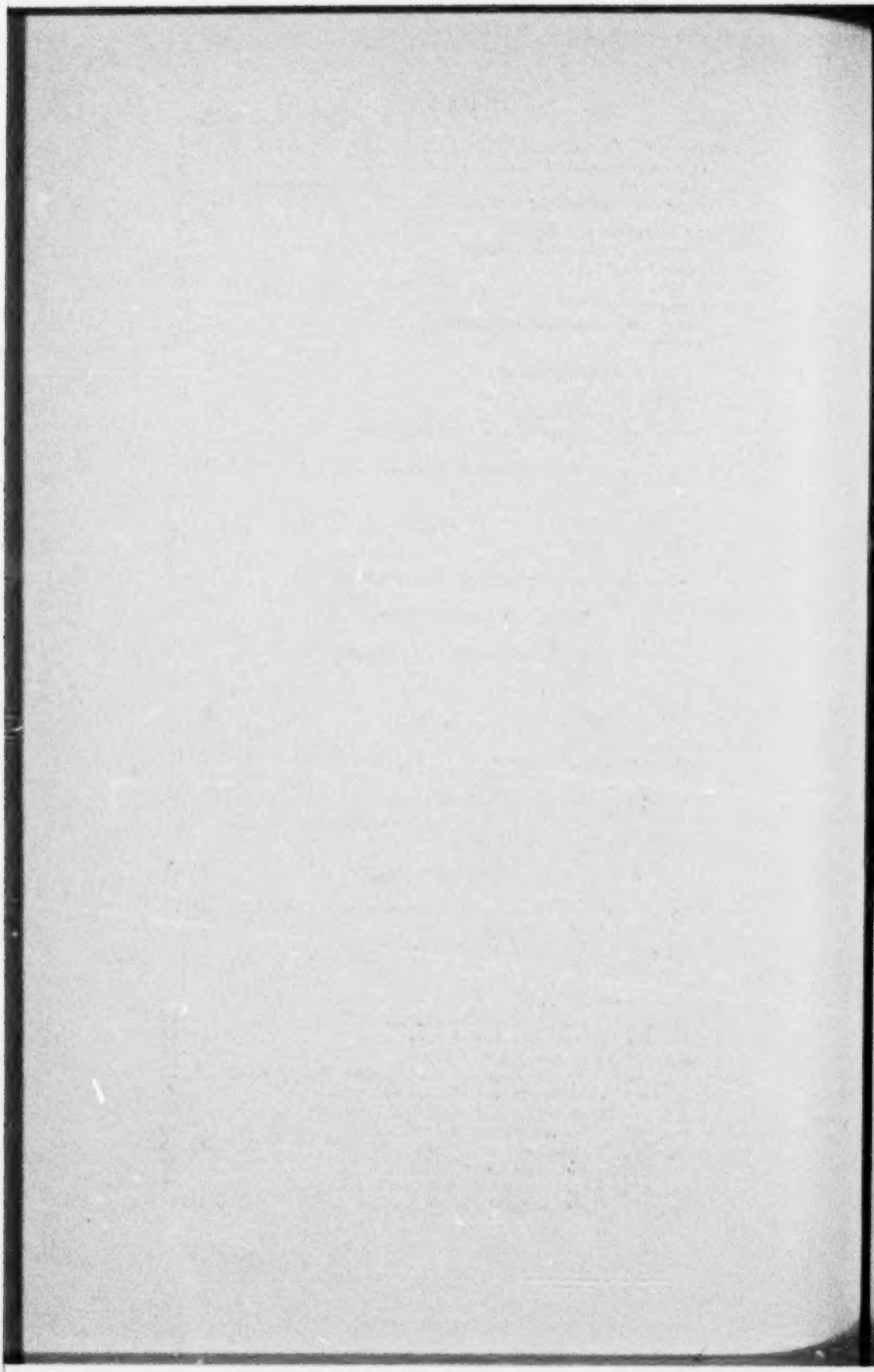
OCTOBER TERM, 1931.

No. [redacted] 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,
v.
THE UNITED STATES OF
AMERICA.

## Petition for Certiorari and Brief

JOHN M. PERRY,
AUGUSTUS BENNERS,
JOHN W. DRYE, JR.,
Counsel for Petitioners.



## INDEX


| | Page |
|---|---|
| I. Petition for Certiorari | 1 |
| Question presented | 2 |
| Statement | 3 |
| Reasons for granting petition | 6 |
| II. Brief in Support of Petition | 10 |
| Opinions of the courts below | 10 |
| Jurisdiction | 10 |
| Statement | 10 |
| Statutes involved | 10 |
| Specification of error to be urged | 12 |
| Argument | 12 |
| *Authorities Cited:* | |
| Almeda Park Co. v. Lucas, 37 Fed. (2nd) 805 | 16 |
| American Powder Mills v. Commissioner, 12 B.T.A. 305 | 7 |
| Bowers v. N. Y. & Albany Lighterage Co., 273 U.S. 346 | 4, 15, 16 |
| Dortch v. Commissioner, 19 B.T.A. 159 | 8 |
| Graham v. Dupont, 262 U.S. 234, 258 | 15 |
| Guardian Trust Company v. Commissioner, 15 B.T.A. 1256 | 8 |
| Gulf States Steel Co. v. Commissioner, 12 B.T.A. 1244, 1251 | 5 |
| Irvons Coal & Coke Company v. Commissioner, 18 B.T.A. 298 | 8 |
| Lieber v. Commissioner, 13 B.T.A. 1175 | 8 |
| Martin Hotel Co. v. Commissioner, 18 B.T.A. 826 | 8 |
| National Refining Company, Appeal of, 1 B.T.A. 236 | 15 |
| Schoettle Company v. Commissioner, 13 B.T.A. 950 | 7 |
| United States v. Alexander, 110 U.S. 325 | 14 |
| United States v. John Barth Company, 279 U.S. 370 | 9, 17 |
| United States v. Martin Hotel Company, 52 Fed. (2nd) 161, 163 | 9, 19 |
| Western Casket Company v. Commissioner, 12 B.T.A. 792 | 8 |
| *Statutes Cited:* | |
| Sec. 240 (a) Judicial Code as amended | 10 |
| Sec. 279 (a) Revenue Act of 1924 | 6, 11, 13 |
| Sec. 279 (b) Revenue Act of 1924 | 11 |
| Sec. 906 (e) Revenue Act of 1924 as amended | 2, 7, 10, 13, 15 |
| Sec. 907 (a) Revenue Act of 1924 as amended | 20 |
| Sec. 274 (a) Revenue Act of 1926 | 10 |
| Sec. 274 (b) Revenue Act of 1926 | 11, 16 |
| Sec. 279 (f) Revenue Act of 1926 | 6, 11, 12, 13 |
| Sec. 283 (c) Revenue Act of 1926 | 10 |
| Sec. 1105 Revenue Act of 1926 | 10 |
| Sec. 273 (f) Revenue Act of 1928 | 6, 11, 12 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No._____

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,
v.
THE UNITED STATES OF
AMERICA.

## PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Gulf States Steel Company and National Surety Company pray that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on February 19, 1932 (R. 203) affirming a judgment of the District Court of the United States for the Southern Division of the Northern District of Alabama, entered on May 1, 1931 (R. 52), by which judgment the United States of America recovered of petitioners the sum of $209,999.98.

## QUESTION PRESENTED.

This suit was brought on a bond given to the Collector of Internal Revenue in connection with a deficiency in income and profits taxes which had been tentatively determined and assessed.

The condition of the bond is that it is of no effect if the principal or surety "shall pay to said Collector so much of the amount of the claim *as is not abated.*" (Italics supplied.)

After the bond was given, the United States Board of Tax Appeals, in a decision which has become final, held that there was "no deficiency" in respect of the tax. The reason for the decision as given in the opinion was the running of the Statute of Limitations on a date prior to the date the bond was given. The Board considered it unnecessary to pass on the issue involving the merits of the claim. The sole question in this case is whether the final decision of the Board that there was no deficiency *"abated"* the tax.

The question involves the construction of Sec. 906(e) of the Revenue Act of 1924, as amended by the Revenue Acts of 1926 and 1928, which is as follows:

> "If the assessment or collection of any tax is barred by the Statute of Limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

This statute is not referred to in the opinion of the Circuit Court of Appeals, nor has it been construed by any Court.

The question is of great general importance to both taxpayers and the Government. Many bonds have been given under similar circumstances. One case has already reached the United States Circuit Court of Appeals for the Eighth Circuit.

## STATEMENT.

This action was brought by the United States in the District Court of the United States for the Southern Division of the Northern District of Alabama, to recover against Gulf States Steel Company, as principal, and National Surety Company, as surety, on a bond given to the Collector of Internal Revenue for the District of Alabama on September 9, 1925, in connection with certain income and excess profits taxes for 1917, which the Collector of Internal Revenue claimed to be due from the Gulf States Steel Company.

Gulf States Steel Company filed its income and excess profits tax returns for the calendar year 1917 with the Collector of Internal Revenue for the District of Alabama on March 28, 1918, and on June 25, 1918, paid in full the amount of taxes in the total sum of $989,790.57, shown on said returns to be due.

Thereafter, the Commissioner of Internal Revenue examined said returns and tentatively determined a deficiency in the taxes reported of $153,815.30, and in April, 1921, assessed the amount of said tentative deficiency against Gulf States Steel Company. On May 6, 1921, Gulf States Steel Company filed a claim for the abatement of the full amount of this deficiency. On March 13, 1923, a surety bond was given to the

Collector; on this bond Gulf States Steel Company was principal and American Surety Company was surety. On April 23, 1925, the individual bond of Gulf States Steel Company, for a larger sum than the first bond, in the form of an agreement under which Liberty Bonds were deposited as collateral, was filed. Thereafter, on September 9, 1925, to secure the release of the Liberty Bonds, Gulf States Steel Company, as principal, and National Surety Company, as surety, delivered to the Collector the bond on which recovery was had, the condition of which was to pay "so much of the amount of the claim as is not abated." The collector acquiesced in these substitutions.

On May 12, 1926, the Commissioner of Internal Revenue finally determined the deficiency in the amount assessed, and rejected the claim for abatement filed by Gulf States Steel Company. From this final determination, Gulf States Steel Company appealed by petition to the United States Board of Tax Appeals, to which jurisdiction in the premises duly appertained. In its petition on appeal (R. 159) Gulf States Steel Company contended in substance that there was no liability for such taxes because (1) the Commissioner had refused to make a proper allowance for depletion (R. 160—par. 4(a)(6)): (2) the Commissioner had refused to allow the proper amount of invested capital (R. 161—par. 4(c)). After the decision of this Court in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S., 346, it amended its petition on appeal to set up a third contention, to wit, that (3) the Statute of Limitations upon the collection of the taxes had expired. (R. 136—par. 4(d)).

The depletion question was settled by stipulation; evidence was introduced before the Board of Tax Appeals on the issues of invested capital and the Statute of Limitations.

Thereafter, on July 10, 1928, the Board of Tax Appeals handed down its decision that "there is no deficiency for the year 1917." *Gulf States Steel Company* v. *Commissioner,* 12 B. T. A., 1244, 1251. (R. 106-117.) The reason for the decision given in the opinion was the running of the Statute of Limitations on March 18, 1923, the Board saying in view of its decision: "It does not become necessary to consider the third issue relating to invested capital for 1917." On October 28, 1928, the Board entered its order of redetermination pursuant to this decision (R. 104-105). On April 9, 1929, the Commissioner of Internal Revenue filed his petition for a review of the decision of the Board in the United States Circuit Court of Appeals for the Fifth Circuit. The review was dismissed by that Court upon the motion of the Commissioner on December 3, 1929. (R. 78.)

In August, 1930, following the dismissal of the appeal to the Circuit Court, the Government instituted its action in the District Court to recover upon the bond given to the Collector on September 9, 1925. It is alleged in the plaintiffs' complaint (R. 15-16) that the claim for abatement was rejected by the Commissioner on May 12, 1926, "whereby there remained unpaid and unabated" the full amount of taxes assessed as above set forth, and that the "finding and determination of the Commissioner of Internal Revenue rejecting said claim for abatement has remained and now is

in full force, vigor and effect, unvacated, unreversed and unmodified." The defendants interposed their pleas, denying the above allegation and alleging the reversal of the Commissioner and the abatement of the taxes by the final decision of the United States Board of Tax Appeals. (R. 43, 46, 47.) On May 1, 1931, the Government demurred to these pleas. (R. 50-51.) The demurrers were sustained and the judgment was entered on May 1, 1931. (R. 52.) Upon writ of error, the judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit on February 19, 1932. (R. 203.) Judge Sibley dissenting.

For the provisions of the Statutes involved, reference is made to the supporting brief included herein.

## REASONS FOR GRANTING THE PETITION.

1. The Circuit Court of Appeals erred in holding that the claim for deficiency in taxes for 1917 had not been abated by the decision of the Board that there was no deficiency.

2. This case raises an important question of Federal law which has not been but which should be settled by this Court.

The condition of the bond sued upon is in the language provided in the Revenue Act of 1924, Sec. 279(a), for bonds given in connection with jeopardy assessments; its provisions are also substantially those prescribed by Sec. 279(f) of the Revenue Act of 1926, and Section 273(f) of the Revenue Act of 1928. These sections recognize the decision of the Board that

there is no deficiency in respect of a tax assessed, as *abating* the tax. Decisions by the Board of Tax Appeals that the collection of an assessment is barred by the Statute of Limitations are declared to be of the same effect as a decision on the merits. Sec. 906(e) Revenue Act of 1924 as amended by the 1926 and 1928 Acts (*supra* at page 2, *infra*, pp. 10, 11). The Board has jurisdiction, which it has repeatedly exercised, to hold that there is no deficiency on the ground of the Statute of Limitations. If the decision of the Circuit Court remains unreversed, the taxpayers who have furnished bonds in accordance with the requirements of the Statutes will be denied the benefit of the Statute of Limitations, irrespective of whether or not the Statute ran before the bonds were given. In view of these statutory provisions, the proper construction of the provisions of the bond, in the language of Judge Sibley in his dissenting opinion "is important."

3. The principle involved is one of great general importance to the Government as well as to taxpayers. Counsel for the Government have repeatedly stated that there are many cases pending or about to be instituted which will be affected or controlled by the decision in this case. The Board of Tax Appeals has handed down decisions of no deficiency on the grounds of the Statute of Limitations in many cases in which bonds have been given. Among these cases are:

*American Powder Mills* v. *Commissioner*, 12 B. T. A., 305.

*Schoettle Company* v. *Commissioner*, 13 B. T. A., 950.

*Lieber, etc., Executors* v. *Commissioner*, 13 B. T. A., 1175.

*Dortch* v. *Commissioner*, 19 B. T. A., 159.

*Guardian Trust Company* v. *Commissioner*, 15 B. T. A., 1256.

*Western Casket Company* v. *Commissioner*, 12 B. T. A., 792.

*Irvona Coal & Coke Company* v. *Commissioner*, 18 B. T. A., 298.

*Martin Hotel Company* v. *Commissioner*, 18 B. T. A., 826.

Furthermore, the Board in this case considered that its decision on limitations was of the same effect on the tax as a decision on the merits. Consequently, it held it was not necessary to consider the merits of the taxpayer's case. *When the Commissioner dismissed his own appeal from the Board's decision, the Board's decision became final and, if the judgment sought to be reviewed is sustained, the taxpayer was by the act of the Commissioner denied the opportunity which the Statute gives of ever having a determination of the merits of its case.* Likewise, in many other cases a similar situation has arisen, resulting in a denial to taxpayers of decisions on the merits. As Judge Sibley points out, the majority opinion "forfeits the defense of limitation already accrued on giving the statutory bonds" required to be given by the Acts. For the future, as in the past, the situation will be that a taxpayer against whom an unjust assessment has been made and who must file a bond to have his case heard before the payment of the tax, cannot plead the

Statute of Limitations, while another taxpayer who has been given the right to appeal before the assessment has been made, may safely plead the statute.

4. The decision constitutes unwarranted application of the decision of this Court in the case of *United States* v. *John Barth Company*, 279 U. S., 370. In that case the bond involved did not provide for the abatement of the tax and there had been no decision of the Board reversing the Commissioner and abating the tax. It is also in apparent conflict with the decision of the District Court of the United States for the District of Nebraska within the Circuit of the Court of Appeals for the Eighth Circuit (*United States* v. *Martin Hotel Co.*, 52 Fed. (2nd), 161, 163), decided May 27, 1931.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals should be granted.

JOHN M. PERRY,
JOHN W. DRYE, JR.,
Counsel for Petitioners.

## BRIEF IN SUPPORT OF PETITION.

### Opinions of the Courts Below.

The District Court rendered no formal opinion in the case. The opinion of the Circuit Court of Appeals was announced on February 19, 1932. It appears at page 191, and Judge Sibley's dissenting opinion at page 197 of the record.

### Jurisdiction.

The Judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on February 19, 1932 (R. 203).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Ch. 229, 43 St. 936).

### Statement.

A statement of the facts will be found in the petition.

### Statutes Involved.

The appeal to the United States Board of Tax Appeals was taken pursuant to Sec. 283(e) of the Revenue Act of 1926. As the jurisdiction of the Board and the finality of its decision have never been questioned, this Section and Sections 274(a) and 1105, of the Revenue Act of 1926 bearing thereon, will not be set forth. Provisions of the statutes particularly pertinent to the issue are as follows:

*Sec. 906(e) of the Revenue Act of 1924 as amended by Sec. 1000 of the Revenue Act of 1926 and Sec. 601 of the Revenue Act of 1928.*

"If the assessment or collection of any tax is barred by any Statute of Limitations the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

*Sec. 274(b) of the Revenue Act of 1926.* "If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the Collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in Court with or without assessment."

The provisions of the Statutes which recognize the decision of the Board that there is no deficiency in respect of a tax assessed, as abating the tax, are Sections 279(a) and (b) of the Revenue Act of 1924, Sec. 279(f) of the Revenue Act of 1926, and Sec. 273(f) of the Revenue Act of 1928. For the sake of brevity only the material portions will be set forth.

"*Sec. 279(a)(b) Rev. Act 1924* (a) * * * Such claim shall be accompanied by a bond * * * conditioned upon the payment of so much of the amount of the claim as is not abated * *.

"(b) * * * If the claim is denied in whole or in part by the Commissioner (or the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be col-

lected as part of the tax upon notice and demand from the Collector, and the amount, the claim for which is allowed, shall be abated."

"*Sec. 279(f) Rev. Act. 1926,* and *Sec. 273(f) of the 1928 Act:* * * * the taxpayer * * * may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the Collector a bond * * * conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final * *."

## SPECIFICATION OF ERROR TO BE URGED.

The error which petitioners urge as ground for the granting of the writ of certiorari and for reversal of the judgment of the Circuit Court of Appeals for the Fifth Circuit is:

That the Court erred in holding that the claim for the deficiency of taxes was not abated by the final decision of the United States Board of Tax Appeals that there was no deficiency.

## ARGUMENT.

### I.

**The claim for deficiency of taxes was abated and the bond became of no effect in accordance with its terms prior to the institution of this action.**

This is an action upon a bond; it is not an action to collect taxes. As it is an action on a bond, the

cause of action given by the bond is necessarily founded upon the language of the bond itself. Under that language the bond is of no effect if the petitioners have paid "so much of the amount of the claim as is not abated." The sole question then is, was the claim abated by the decision of the Board?

The word "abate" is not defined in the bond or in any of the Revenue Acts. The second and third bonds (this suit being on the third bond) were given, however, after the enactment of the Revenue Act of 1924, and are in the exact language of that Act (Sec. 279(a)) which characterizes as an abatement the decision of the Board that there is no deficiency in respect of a tax which has been assessed. The language of this section is substantially the same as that used in Sec. 279(f) of the Revenue Act of 1926 under which the appeal to the Board was decided.

The conclusion is reached in the majority opinion in the Circuit Court of Appeals that if the decision of the Board had been upon the merits the tax would have been abated, but this conclusion fails to take into account Sec. 906(e) of the Revenue Act of 1924, as amended by the Revenue Acts of 1926 and 1928, which specifically provides that a decision by the Board on the Statute of Limitations is equivalent to a decision on the merits, i. e., "that there is no deficiency in respect of such tax." The majority opinion makes no effort to explain why this Section should be ignored; why a decision on the merits in one case abates a tax and a decision on limitations, which Sec. 906(e) makes of the same effect as a decision on the

merits, does not. Besides, no mention being made of that section, the decision is based on a definition of abatement in two Massachusetts cases arising under the poor laws of that State over 100 years ago. That definition requires a cancellation of the tax on account of some defect in the original assessment. This position is effectively answered by Judge Sibley in his dissenting opinion when he points out:

> "The point in that case was whether a pauper could claim support from a township as having theretofore *paid* five years' taxes when in fact some of them had been *forgiven* him. No question of abatement by limitation was involved. If it be true that in Massachusetts jurisprudence abatement refers only to error or mistake in assessment and not to remission of taxes, the contrary is true in the Federal jurisprudence.
>
> "In R. S., g2984 and g3221, the Secretary of the Treasury was authorized in certain cases to remit taxes duly and properly assessed on imported merchandise or distilled liquors which were afterwards accidentally destroyed. In both sections the remission before payment, although not for an error in the assessment, is termed an abatement, and after payment a refund; and the Supreme Court uses the word "abate" in that meaning in *United States* v. *Alexander,* 110 U. S., 325. A tax may therefore properly be said to be abated not only for errors and mistakes in its assessment, but for matters arising afterwards and before its collection."

It will be recalled that prior to the decision of this Court in *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S., 346, limitations on collections by distraint was not recognized, and prior to the Revenue Act of 1924 when the Board of Tax Appeals was created, there was no procedure by which a taxpayer could contest liability for income taxes erroneously assessed by the Commissioner except to pay the tax and proceed by claim for refund and suit thereon. *Graham* v. *Dupont*, 262 U. S., 234, 258. As taxes had to be paid before suit, the question of abatement rarely arose. The very Act which created the Board and set up the procedure for contesting a tax before payment characterized the power of the Board to disallow an assessment as an abatement, and that characterization is carried into all the later Acts. No provision is found in the first or subsequent Acts which limits the effect of the Board's decision in this respect to a decision based on an error in the original assessment. From December 23, 1924, when the Board handed down its decision in *Appeal of National Refining Company*, 1 B. T. A., 236, it has repeatedly exercised its jurisdiction to disallow deficiencies proposed or assessed, on the ground of the running of the Statute of Limitations.

Even if we did not have the Sections of the Acts cited above and the decision of this Court to which Judge Sibley refers as authority for the contention that the taxes were abated as a result of the Board's decision, and were forced to look

to accepted definitions of the term "abate" we would point to Funk & Wagnall's New Standard Dictionary where this definition is found: "To remit all or part of, as a tax." The word "remit" is defined as "to refrain from exacting." Certainly, under Sections 906(e) of the Revenue Act of 1924 as amended by the 1926 Act, and 274(b) of the Revenue Act of 1926, the Government was required to and did refrain from exacting the taxes. It admits it cannot collect the taxes and has no valid claim for the taxes. It disavows any intention of collecting taxes in this suit. It contends, however, that it has a right to recover the contractual amount of the bond. But the contract is to pay so much of the claim for the tax as is not abated. The claim for the tax has been abated and there is no liability on the bond.

It is immaterial that limitations was not one of the grounds in the abatement claim. The bond was not limited to the grounds therein stated and had all such grounds been conceded the assessment might have been sustained on other grounds when the final determination was made and no abatement would have resulted. As pointed out by Judge Sibley, it was proper to set up limitations as a ground of abatement at any time before the final decision of the Board, *Almeda Park Co.* v. *Lucas*, 37 Fed. (2nd), 805, and cases cited. And there was no impropriety in pleading it after the decision of this Court on February 21, 1927, in the *New York & Albany Lighterage Company* case, established its validity as a ground of abatement.

## II.

**The decision of this Court in the John Barth Company case, relied upon by the Court below, is not in point.**

The majority in the Court below held that the Government was entitled to recover upon the authority of this Court's decision in the Barth case, 279 U. S., 370. Judge Sibley, in his dissenting opinion, has pointed out that this case is not controlling. In addition to the points made by Judge Sibley, it is pertinent to observe that in the Barth case the Government sued the principal and surety on a bond which obligated the defendants to pay "on notice and demand by the Collector * * * any part of such tax found by the Commissioner to be due * * *." The defendants demurred to the complaint on the grounds that the Statute of Limitations had run on the collection of the tax. By the demurrer the defendants admitted the pleaded facts, that (1) the Collector had demanded payment, and (2) the tax had been "found by the Commissioner to be due." When these facts were established, the liability on the bond was established in accordance with its exact terms.

The defendants did not contend, as in this case, that the condition of the bond had been fulfilled, but sought to set up in an action on a contract to pay the tax, the Statute of Limitations on collection of the tax independent of any agreement to pay it. This Court permitted no collateral attack on the finding of the Commissioner, saying (page 375):

> "The making of the bond gives the United States a cause of action separate and distinct

> from an action to collect taxes which it already had. The statutes now pleaded to bar the suit cannot be extended by implication to a suit upon a subsequent and substituted contract."

The petitioners in the instant case did not plead the Statute of Limitations, they pleaded the fact that the claim for the tax had been abated by the decision of the Board and the provisions of the contract exempting them from liability in this event.

Moreover, in the Barth case, the bond was given prior to the running of the Statute of Limitations. In the instant case, the bond on which this suit was brought was given more than two years after the Statute had run.

The surety on this bond was not a party to an obligation given before the running of the Statute, as in the Barth case. Its relation to the United States is, as pointed out by Judge Sibley, that of surety to another, and its obligation is one of strict law, measured solely by the bond it signed, fairly interpreted.

In addition, this Court said in the Barth case at page 375:

> "The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given."

In the instant case, the Board held that the bond was not a waiver of the Statute and was not given for the purpose of extending the time of

collection. (R. 114.) It also held that as it had given one reason for its holding of no deficiency, it was idle to pass upon the question of invested capital. That decision could have been reviewed on appeal and only on appeal. The appeal was dismissed. The decision has become final. It is not subject to collateral attack.

In *United States* v. *Martin Hotel Company* (52 Fed. (2nd), 161, 163), decided by the District Court of the United States for the District of Nebraska, Omaha Division, on May 27, 1931, the Government was denied recovery under an escrow contract given to secure payment of "taxes when and to the extent that they should finally be determined to be just and payable," where the Board of Tax Appeals had held that there was no deficiency because of the running of the Statute of Limitations. The Court said at page 163:

> "Finding as I do under the Barth case, that the giving of the security by the taxpayers operated to postpone the time within which there could have been a determination of the assessments that would have bound the taxpayers upon their contract of security the action of the Board appears contrary to my understanding. The Board, as I see it, ought to have reviewed the assessments and so saved the rights of the government, if any. *But the Court of Appeals alone had jurisdiction to review the action of the Board. The Board and the Board alone had the power to decide whether or not upon a fair assessment there were any taxes due and it decided, for reasons sufficient to itself, that there were no excess*

*taxes and so declared. I conclude therefore that the government is not entitled to recover anything herein on account of the promise in the contract to pay 1919 taxes.*" (Italics ours.)

This case is pending on appeal to the Circuit Court of Appeals, Eighth Circuit.

To permit a collateral attack at this time on the decision of the Board would not only be contrary to the specific provisions of the Statute, under which the decision of the Board became final when the appeal to the Circuit Court was dismissed, but would deny to these defendants substantial rights. Had the Government prosecuted its appeal to the Circuit Court, and had the Court decided that the reason for the Board's decision was unsound under the Barth case, or on other grounds that Court would have sent the case back to the Board for a determination on the invested capital question.

The decision of the Circuit Court of Appeals in this case treats the action of the Board of Tax Appeals as not being a *disposition* of the appeal because of the reasons given for its decision.

Our contention is that the *action* of the Board of Tax Appeals on an appeal to it is analogous to the judgment of a court and is effective independently of the reasons for it. This position is fortified by the following from Section 907(a) of the Act of 1924 as amended by the Act of 1926, which was in force when the appeal was decided by the Board:

"Whenever the Board deems it advisable the report shall contain an opinion in writing

in addition to the finding of fact and *decision.*"

If the decision of the Circuit Court of Appeals remains unreversed by this Court, these defendants will have lost, through no fault of their own, all right to have determined their claim that no additional tax liability ever existed, a right which the Statutes permitting the appeal to the Board gave to them.

Accepting the finding of this Court in the Barth case that "the making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes," it follows that the cause of action given by the bond depends upon the terms of the bond. Those terms obligate the petitioners to pay only so much of the claim as is not abated. As no part of the tax claimed remains unabated, there is nothing to be paid.

## CONCLUSION.

In view of the fact that the question here involved is one of great general importance because of pending cases and cases which are likely to arise in the future, and in view of the errors made by the Court below, it is respectfully submitted that the petition for writ of certiorari should be granted.

JOHN M. PERRY,
AUGUSTUS BENNERS,
JOHN W. DRYE, JR.
Counsel for Petitioners.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932

No. 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,

v.

THE UNITED STATES OF
AMERICA

## Brief for Petitioners

JOHN M. PERRY,
AUGUSTUS BENNERS,
JOHN W. DRYE, JR.,
Counsel for Petitioners.

# INDEX


| | PAGE |
|---|---|
| Opinions of the Courts below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 4 |
| Specification of Error to be urged | 8 |
| Argument: | |
| (1) The claim for deficiency of taxes was abated and the bond became of no effect in accordance with its terms prior to the institution of this action | 8 |
| (2) The decision of this Court in the John Barth Company case, relied upon by the Court below, is not in point | 13 |


*Authorities Cited:*


| | |
|---|---|
| Almeda Park Co. v. Lucas, 37 Fed. (2nd) 805 | 12 |
| Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346 | 6, 10, 12 |
| Graham v. Dupont, 262 U. S. 234, 258 | 11 |
| Gulf States Steel Co. v. Commissioner, 12 B. T. A. 1244, 1251 | 6 |
| National Refining Company, Appeal of, 1 B. T. A. 236 | 11 |
| United States v. Alexander, 110 U. S. 325 | 10 |
| United States v. John Barth Company, 279 U. S. 370 | 13 |
| United States v. Martin Hotel Company, 52 Fed. (2nd) 161, 163 | 16 |


*Statutes Cited:*


| | | |
|---|---|---|
| Sec. 240(a) | Judicial Code as amended | 1 |
| Sec. 279(a) | Revenue Act of 1924 | 3, 4, 9 |
| Sec. 279(b) | Revenue Act of 1924 | 3, 4 |
| Sec. 906(e) | Revenue Act of 1924 as amended | 3, 9, 11 |
| Sec. 907(a) | Revenue Act of 1924 as amended | 17 |
| Sec. 274(a) | Revenue Act of 1926 | 2 |
| Sec. 274(b) | Revenue Act of 1926 | 3, 11 |
| Sec. 279(f) | Revenue Act of 1926 | 4, 9 |
| Sec. 283(e) | Revenue Act of 1926 | 2 |
| Sec. 1105 | Revenue Act of 1926 | 2 |
| Sec. 273(f) | Revenue Act of 1928 | 4 |

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## BRIEF FOR PETITIONERS

### Opinions of the Courts Below

The District Court rendered no formal opinion in the case. The opinion of the Circuit Court of Appeals was announced on February 19, 1932, 56 Fed. (2d) 43. It appears at page 109, and Judge Sibley's dissenting opinion at page 115 of the record.

## JURISDICTION

The Judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on February 19, 1932 (R.119).

The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as

amended by the Act of February 13, 1925 (Ch. 229, 43 St. 936). The petition for certiorari was filed March 23, 1932, and was granted April 25, 1932.

## QUESTION PRESENTED

This suit was brought on a bond given to the Collector of Internal Revenue in connection with a deficiency in income and profits taxes which had been tentatively determined and assessed.

The condition of the bond is that it is of no effect if the principal or surety "shall pay to said Collector so much of the amount of the claim *as is not abated.*" (Italics supplied.)

After the bond was given, the United States Board of Tax Appeals, in a decision which has become final, held that there was "no deficiency" in respect of the tax. The reason for the decision as given in the opinion was the running of the Statute of Limitations on a date prior to the date the bond was given. The Board considered it unnecessary to pass on the issue involving the merits of the claim. The sole question in this case is whether the final decision of the Board that there was no deficiency "*abated*" the tax.

## STATUTES INVOLVED

The appeal to the United States Board of Tax Appeals was taken pursuant to Sec. 283(e) of the Revenue Act of 1926. As the jurisdiction of the Board and the finality of its decision have never been questioned, this Section and Sections 274(a) and 1105, of the Revenue Act of 1926 bearing thereon, will not be set forth.

The question presented involves the construction of Section 906(e) of the Revenue Act of 1924, as amended by the Revenue Acts of 1926 and 1928, and Section 274(b) of the Revenue Act of 1926. These Statutes are not referred to in the opinion of the Circuit Court of Appeals, and apparently have not been construed by any court.

*Sec. 906(e) of the Revenue Act of 1924 as amended by Sec. 1000 of the Revenue Act of 1926 and Sec. 601 of the Revenue Act of 1928.*

"If the assessment or collection of any tax is barred by any Statute of Limitations the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

*Sec. 274(b) of the Revenue Act of 1926.* "If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the Collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in Court with or without assessment."

The provisions of the Statutes which recognize the decision of the Board that there is no deficiency in respect of a tax assessed, as abating the tax, are Sections 279(a) and (b) of the Revenue

Act of 1924, Sec. 279(f) of the Revenue Act of 1926, and Sec. 273(f) of the Revenue Act of 1928. For the sake of brevity only the material portions will be set forth.

> "*Sec. 279(a)(b) Rev. Act 1924* (a) * * * Such claim shall be accompanied by a bond * * * conditioned upon the payment of so much of the amount of the claim as is not abated. * * *
>
> "(b) * * * If the claim is denied in whole or in part by the Commissioner (or the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the Collector, and the amount, the claim for which is allowed, shall be abated."
>
> "*Sec. 279(f) Rev. Act 1926, and Sec. 273(f) of the 1928 Act:* * * * the taxpayer * * * may obtain a stay of collection of the whole or any part of the amount of the asssesment by filing with the Collector a bond * * * conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final * * *."

## STATEMENT

This action was brought by the United States in the District Court of the United States for the Southern Division of the Northern District of Alabama, to recover against Gulf States Steel

Company, as principal, and National Surety Company, as surety, on a bond given to the Collector of Internal Revenue for the District of Alabama on September 9, 1925, in connection with certain income and excess profits taxes for 1917, which the Collector of Internal Revenue claimed to be due from the Gulf States Steel Company.

Gulf States Steel Company filed its income and excess profits tax returns for the calendar year 1917 with the Collector of Internal Revenue for the District of Alabama on March 28, 1918, and on June 25, 1918, paid in full the amount of taxes in the total sum of $989,790.57, shown on said returns to be due.

Thereafter, the Commissioner of Internal Revenue examined said returns and tentatively determined a deficiency in the taxes reported of $153,815.30, and in April, 1921, assessed the amount of said tentative deficiency against Gulf States Steel Company. On May 6, 1921, Gulf States Steel Company filed a claim for the abatement of the full amount of this deficiency. On March 13, 1923, a surety bond was given to the Collector; on this bond Gulf States Steel Company was principal and American Surety Company was surety. On April 23, 1925, the individual bond of Gulf States Steel Company, for a larger sum than the first bond, in the form of an agreement under which Liberty Bonds were deposited as collateral, was filed. Thereafter, on September 9, 1925, to secure the release of the Liberty Bonds, Gulf States Steel Company, as principal, and National Surety Company, as surety, delivered to the Collector the bond on

which recovery was had, the condition of which was to pay "so much of the amount of the claim as is not abated." The Collector acquiesced in these substitutions.

On May 12, 1926, the Commissioner of Internal Revenue finally determined the deficiency in the amount assessed, and rejected the claim for abatement filed by Gulf States Steel Company. From this final determination, Gulf States Steel Company appealed by petition to the United States Board of Tax Appeals, to which jurisdiction in the premises duly appertained. In its petition on appeal (R.91) Gulf States Steel Company contended in substance that there was no liability for such taxes because (1) the Commissioner had refused to make a proper allowance for depletion (R.92 par. 4(a)); (2) the Commissioner had refused to allow the proper amount of invested capital (R.92 par. 4(c)). After the decision of this Court in *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, it amended its petition on appeal to set up a third contention, to wit, that (3) the Statute of Limitations upon the collection of the taxes had expired. (R.77 par. 4(d)).

The depletion question was settled by stipulation; evidence was introduced before the Board of Tax Appeals on the issues of invested capital and the Statute of Limitations.

Thereafter, on July 10, 1928, the Board of Tax Appeals handed down its decision that "there is no deficiency for the year 1917." *Gulf States Steel Company v. Commissioner*, 12 B. T. A. 1244, 1251. (R.59-66.) The reason for the decision

given in the opinion was the running of the Statute of Limitations on March 18, 1923, the Board saying in view of its decision: "It does not become necessary to consider the third issue relating to invested capital for 1917." On October 28, 1928, the Board entered its order of redetermination pursuant to this decision (R.58). On April 9, 1929, the Commissioner of Internal Revenue filed his petition for a review of the decision of the Board in the United States Circuit Court of Appeals for the Fifth Circuit. The review was dismissed by that Court upon the motion of the Commissioner on December 3, 1929. (R.45.)

In August, 1930, following the dismissal of the appeal to the Circuit Court, the Government instituted its action in the District Court to recover upon the bond given to the Collector on September 9, 1925. It is alleged in the plaintiffs' complaint (R.10-11) that the claim for abatement was rejected by the Commissioner on May 12, 1926, "whereby there remained unpaid and unabated" the full amount of taxes assessed as above set forth, and that the "finding and determination of the Commissioner of Internal Revenue rejecting said claim for abatement has remained and now is in full force, vigor and effect, unvacated, unreversed and unmodified." The defendants interposed their pleas, denying the above allegation and alleging the reversal of the Commissioner and the abatement of the taxes by the final decision of the United States Board of Tax Appeals. (R.24, 26.) On May 1, 1931, the Government demurred to these pleas. (R.28-29.) The

demurrers were sustained and the judgment was entered on May 1, 1931. (R.29.) Upon writ of error, the judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit on February 19, 1932. (R.119.) Judge Sibley dissenting.

## SPECIFICATION OF ERROR TO BE URGED

The error which petitioners urge as ground for reversal of the judgment of the Circuit Court of Appeals for the Fifth Circuit is:

That the Court erred in holding that the claim for the deficiency of taxes was not abated by the final decision of the United States Board of Tax Appeals that there was no deficiency.

## ARGUMENT

### I.

**The claim for deficiency of taxes was abated and the bond became of no effect in accordance with its terms prior to the institution of this action.**

This is an action upon a bond; it is not an action to collect taxes. As it is an action on a bond, the cause of action given by the bond is necessarily founded upon the language of the bond itself. Under that language the bond is of no effect if the petitioners have paid "so much of the amount of the claim as is not abated." The sole question then is, was the claim abated by the decision of the Board?

The word "abate" is not defined in the bond or in any of the Revenue Acts. The second and third

bonds (this suit being on the third bond) were given, however, after the enactment of the Revenue Act of 1924, and are in the exact language of that Act. (Sec. 279(a)) which characterizes as an abatement the decision of the Board that there is no deficiency in respect of a tax which has been assessed. The language of this section is substantially the same as that used in Sec. 279(f) of the Revenue Act of 1926 under which the appeal to the Board was decided.

The conclusion is reached in the majority opinion in the Circuit Court of Appeals that if the decision of the Board has been upon the merits the tax would have been abated, but this conclusion fails to take into account Sec. 906(e) of the Revenue Act of 1924, as amended by the Revenue Acts of 1926 and 1928, which specifically provides that a decision by the Board on the Statute of Limitations is equivalent to a decision on the merits, i.e., "that there is no deficiency in respect of such tax." The majority opinion makes no effort to explain why this Section should be ignored; why a decision on the merits in one case abates a tax and a decision on limitations, which Sec. 906(e) makes of the same effect as a decision on the merits, does not. Besides no mention being made of that section, the decision is based on a definition of abatement in two Massachusetts cases arising under the poor laws of that State over 100 years ago. That definition requires a cancellation of the tax on account of some defect in the original assessment. This position is effectively answered by Judge Sibley in his dissenting opinion when he points out:

"The point in that case was whether a pauper could claim support from a township as having theretofore *paid* five years' taxes when in fact some of them had been *forgiven* him. No question of abatement by limitation was involved. If it be true that in Massachusetts jurisprudence abatement refers only to error or mistake in assessment and not to remission of taxes, the contrary is true in the Federal jurisprudence.

"In R.S., g2984 and g3221, the Secretary of the Treasury was authorized in certain cases to remit taxes duly and properly assessed on imported merchandise or distilled liquors which were afterwards accidentally destroyed. In both sections the remission before payment, although not for an error in the assessment, is termed an abatement, and after payment a refund; and the Supreme Court uses the word 'abate' in that meaning in *United States v. Alexander,* 110 U. S. 325. A tax may therefore properly be said to be abated not only for errors and mistakes in its assessment, but for matters arising afterwards and before its collection."

It will be recalled that prior to the decision of this Court in *Bowers v. N. Y. & Albany Lighterage Co.*, 273 U. S. 346, limitations on collections by distraint was not recognized, and prior to the Revenue Act of 1924 when the Board of Tax Appeals was created, there was no procedure by which a taxpayer could contest liability for income taxes erroneously assessed by the Commis-

sioner except to pay the tax and proceed by claim for refund and suit thereon. *Graham v. Dupont*, 262 U. S. 234, 258. As taxes had to be paid before suit, the question of abatement rarely arose. The very Act which created the Board and set up the procedure for contesting a tax before payment characterized the power of the Board to disallow an assessment as an abatement, and that characterization is carried into all the later Acts. No provision is found in the first or subsequent Acts which limits the effect of the Board's decision in this respect to a decision based on an error in the original assessment. From December 23, 1924, when the Board handed down its decision in *Appeal of National Refining Company*, 1 B.T.A. 236, it has repeatedly exercised its jurisdiction to disallow deficiencies proposed or assessed, on the ground of the running of the Statute of Limitations.

Even if we did not have the Sections of the Acts cited above and the decision of this Court to which Judge Sibley refers as authority for the contention that the taxes were abated as a result of the Board's decision, and were forced to look to accepted definitions of the term "abate" we would point to Funk & Wagnall's New Standard Dictionary where this definition is found: "To remit all or part of, as a tax." The word "remit" is defined as "to refrain from exacting." Certainly, under Sections 906(e) of the Revenue Act of 1924 as amended by the 1926 Act, and 274(b) of the Revenue Act of 1926, the Government was required to and did refrain from exacting the taxes. It admits its cannot collect the taxes and

has no valid claim for the taxes. It disavows any intention of collecting taxes in this suit. It contends, however, that it has a right to recover the contractual amount of the bond. But the contract is to pay so much of the claim for the tax as is not abated. The claim for the tax has been abated and there is no liability on the bond.

It is immaterial that limitations was not one of the grounds in the abatement claim. The bond was not limited to the grounds therein stated and had all such grounds been conceded the assessment might have been sustained on other grounds when the final determination was made and no abatement would have resulted. As pointed out by Judge Sibley, it was proper to set up limitations as a ground of abatement at any time before the final decision of the Board, *Almeda Park Co. v. Lucas*, 37 Fed. (2nd) 805, and cases cited. And there was no impropriety in pleading it after the decision of this Court on February 21, 1927, in the *New York & Albany Lighterage Company* case, established its validity as a ground of abatement.

Furthermore, the Board in this case considered that its decision on limitations was of the same effect on the tax as a decision on the merits. Consequently, it held it was not necessary to consider the merits of the taxpayer's case. *When the Commissioner dismissed his own appeal from the Board's decision, the Board's decision became final and, if the judgment sought to be reviewed is sustained, the taxpayer was by the act of the Commissioner denied the opportunity which the Statute gives of ever having a determination of*

*the merits of its case.* Likewise, in many other cases a similar situation has arisen, resulting in a denial to taxpayers of decisions on the merits. As Judge Sibley points out, the majority opinion "forfeits the defense of limitation already accrued on giving the statutory bonds" required to be given by the Acts. For the future, as in the past, the situation will be that a taxpayer against whom an unjunst assessment has been made and who must file a bond to have his case heard before the payment of the tax, cannot plead the Statute of Limitations, while another taxpayer who has been given the right to appeal before the assessment has been made, may safely plead the statute.

## II.

**The decision of this court in the John Barth Company case, relied upon by the court below, is not in point.**

The majority in the Court below held that the Government was entitled to recover upon the authority of this Court's decision in the Barth case, 279 U. S. 370. Judge Sibley, in his dissenting opinion, has pointed out that this case is not controlling. In addition to the points made by Judge Sibley, it is pertinent to observe that in the Barth case the Government sued the principal and surety on a bond which obligated the defendants to pay "on notice and demand by the Collector * * * any part of such tax found by the Commissioner to be due * * *." The defendants demurred to the complaint on the grounds that the Statute of Limitations had run on the collec-

tion of the tax. By the demurrer the defendants admitted the pleaded facts, that (1) the Collector had demanded payment, and (2) the tax had been "found by the Commissioner to be due." When these facts were established, the liability on the bond was established in accordance with its exact terms.

The defendants did not contend, as in this case, that the condition of the bond had been fulfilled, but sought to set up in an action on a contract to pay the tax, the Statute of Limitations on collection of the tax independent of any agreement to pay it. This Court permitted no collateral attack on the finding of the Commissioner, saying (page 375):

> "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit cannot be extended by implication to a suit upon a subsequent and substituted contract."

The petitioners in the instant case did not plead the Statute of Limitations, they pleaded the fact that the claim for the tax had been abated by the decision of the Board and the provisions of the contract exempting them from liability in this event.

Moreover, in the Barth case, the bond was given prior to the running of the Statute of Limitations. In the instant case, the bond on which this suit was brought was given more than two years after the Statute had run.

The surety on this bond was not a party to an obligation given before the running of the Statute, as in the Barth case. Its relations to the United States is, as pointed out by Judge Sibley, that of surety to another, and its obligation is one of strict law, measured solely by the bond it signed, fairly interpreted.

In addition, this Court said in the Barth case at page 375:

> "The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given."

In the case in the Board of Tax Appeals, the Government alleged the giving of the Bond (R.73) and urged that the Bond was a waiver of the Statute of Limitations and that the taxpayer was estopped to set up the running of the Statute as a ground of defeating the tax. On considering these contentions, and reviewing the circumstances under which the bonds were given, the Board said (R.65):

> "Under such circumstances, we cannot hold that there was an intent to waive the statute implied in the bonds when the expression of such an intent was lacking or that there had been established any basis for the application of the doctrine of estoppel."

The Board also held that as it had given one reason for its holding of no deficiency, it was idle to pass upon the question of invested capital. That decision could have been reviewed on appeal

and only on appeal. The appeal was dismissed. The decision has become final. It is not subject to collateral attack.

This proposition was clearly stated by the District Court in *United States v. Martin Hotel Company* (52 Fed. (2nd) 161, reversed by C.C.A. 8th Circuit, May 18, 1932). In that case, an escrow contract was given to secure payment of "taxes when and to the extent that they should finally be determined to be just and payable." The Board of Tax Appeals had held that there was no deficiency because of the running of the Statute of Limitations. The Court said at page 163:

> "Finding as I do under the Barth case, that the giving of the security by the taxpayers operated to postponed the time within which there could have been a determination of the assessments that would have bound the taxpayers upon their contract of security the action of the Board appears contrary to my understanding. The Board, as I see it, ought to have reviewed the assessments and so saved the rights of the government, if any. *But the Court of Appeals alone had jurisdiction to review the action of the Board. The Board and the Board alone had the power to decide whether or not upon a fair assessment there were any taxes due and it decided, for reasons sufficient to itself, that there were no excess taxes and so declared. I conclude therefore that the government is not entitled to recover anything herein on account of the promise in the contract to pay 1919 taxes.*" (Italics ours.)

To permit a collateral attack at this time on the decision of the Board would not only be contrary to the specific provisions of the Statute, under which the decision of the Board became final when the appeal to the Circuit Court was dismissed, but would deny to these defendants substantial rights. Had the Government prosecuted its appeal to the Circuit Court, and had the Court decided that the reason for the Board's decision was unsound under the Barth case, or on other grounds that Court would have sent the case back to the Board for a determination on the invested capital question.

The decision of the Circuit Court of Appeals in this case treats the action of the Board of Tax Appeals as not being a *disposition* of the appeal because of the reasons given for its decision.

Our contention is that the *action* of the Board of Tax Appeals on an appeal to it is analogous to the judgment of a court and is effective independently of the reasons for it. This position is fortified by the following from Section 907(a) of the Act of 1924 as amended by the Act of 1926, which was in force when the appeal was decided by the Board:

> "Whenever the Board deems it advisable the report shall contain an opinion in writing in addition to the finding of fact and *decision.*"

If the decision of the Circuit Court of Appeals remains unreversed by this Court, these defendants will have lost, through no fault of their own, all right to have determined their claim that no

additional tax liability ever existed, a right which the Statutes permitting the appeal to the Board gave to them.

Accepting the finding of this Court in the Barth case that "the making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes," it follows that the cause of action given by the bond depends upon the terms of the bond. Those terms obligate the petitioners to pay only so much of the claim as is not abated. As no part of the tax claimed remains unabated, there is nothing to be paid.

## CONCLUSION

In view of the errors made by the Court below, it is respectfully submitted that the judgment below should be reversed.

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Counsel for Petitioners.

Office Supreme Ct. U. S.
APR. 1
CHARLES ELMO

FILE COPY

No. 24

# In the Supreme Court of the United States

OCTOBER TERM, 1931

GULF STATES STEEL COMPANY AND NATIONAL SURETY COMPANY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 14 |
| Appendix | 15 |


## CITATIONS


| | |
|---|---|
| *Cooke* v. *Graham's Administrator*, 3 Cranch 229 | 12 |
| *Hill* v. *American Surety Co.*, 200 U. S. 197 | 12 |
| *United States* v. *John Barth Co.*, 279 U. S. 370 | 8, 11, 12, 13 |
| *United States* v. *Martin Hotel Co.*, 52 F. (2d) 161 | 13 |

# In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 821

GULF STATES STEEL COMPANY AND NATIONAL Surety Company, petitioners

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

No formal opinion was rendered by the District Court for the Northern District of Alabama. The District Judge, however, expressed his views in a letter to counsel, which is referred to in the opinion of the court below. (R. 191.) The letter is printed as an appendix, *infra*, pp. 15–16. The majority and dissenting opinions of the Circuit Court of Appeals (R. 190–200) have not yet been reported.

### JURISDICTION

The judgment sought to be reviewed was entered February 19, 1932. (R. 200–201.) The petition for certiorari was filed March 26, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether a decision by the Board of Tax Appeals that the collection of income taxes was barred by the statute of limitations, extinguishes the liability under a bond referring to a claim for abatement and conditioned upon the payment of so much of the amount of the claim as was not abated. This bond was the third of a series of such bonds, the first being executed before the statutory period of limitation expired.

### STATUTES INVOLVED

As this is an action to enforce contractual liability on a bond, there are no statutes directly involved. Under our view of the case, we do not deem the statutes referred to in the petition for certiorari and supporting brief to be controlling.

### STATEMENT

This action was brought by the United States to recover from the petitioner Gulf States Steel Company, hereinafter called the Company, as principal, and the petitioner National Surety Company, as surety, on a bond given September 9, 1925, to

the Collector of Internal Revenue for the District of Alabama in connection with a claim made by the Company for the abatement of an additional assessment of income taxes for the year 1917.

According to the averments of the Government's bill of complaint (R. 1–17), which were supported in all material respects by the evidence contained in the bill of exceptions (R. 54 *et seq.*), the Company filed its income tax return for 1917 on March 28, 1918. On the April, 1921, list of income tax assessments the Commissioner of Internal Revenue assessed additional taxes for 1917 in the amount of $153,815.30 against the Company. Notice of this additional assessment and demand for payment was served upon the Company on May 2, 1921. On May 6, 1921, the Company filed a claim for the abatement of the full amount of such additional assessment.

On March 13, 1923, fifteen days before collection would have been barred by the applicable statute of limitations (Section 250 (d), Revenue Act of 1921, c. 136, 42 Stat. 227, 265), while the claim for abatement was still undetermined and the Collector of Internal Revenue was demanding payment of the additional assessment, the Company, as principal, and the American Surety Company, as surety, executed and delivered to the Collector of Internal Revenue a bond conditioned as follows (R. 20):

> The condition of the above obligation is such that, if the said Gulf States Steel Com-

> pany will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and expense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand Eight Hundred Fifteen and 30/100 Dollars ($153,815.30), claimed of it under the War Revenue Act of 1917, pending the filing, by the said Gulf States Steel Company of additional facts and information in support of a claim for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect.

On April 3, 1925, while the claim for abatement was still undetermined and open to the production of further evidence, the Company executed and delivered to the United States another bond bearing the following condition (R. 22):

> The condition of the above obligation is such that, whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand, Three Hundred and Fifty Dollars ($175,350), and in favor of W. E. Snead, Collector of Internal Revenue, for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March,

> 1923, and was given in support of a claim for the abatement of assessments, penalties and interests, under the Revenue Act of 1917. Being desirous of relieving the above bound surety Company and further securing the payment of any amount found to be due the United State government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect.

In lieu of surety the Company pledged $200,000 in Government bonds as security for the performance of its obligations under the foregoing bond.

On September 9, 1925, the claim for abatement being still undetermined, the Company as principal, and the petitioner National Surety Company, as surety, executed and delivered a third bond, the one sued on in this action. The condition of this bond was as follows (R. 30):

> The condition of the above obligation is such that, whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and

interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with the Collector of Internal Revenue for the District of Alabama at Birmingham. On the third day of April, 1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties and interest as is not abated. In lieu of surety on the above bond the said company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following described United States, Fourth Liberty Loan 4¼% Gold Bonds of 1933–8 series, being of the par value of $200,000 (coupons), numbers * * *. The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Alabama. Now, therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by Law, then this obligation shall be of no effect. Otherwise it shall remain in full force.

On December 4, 1925, the Commissioner of Internal Revenue, having considered the claim for abatement and the additional information fur-

nished by the Company, notified the Company that he would reject the claim, and on May 12, 1926, did reject it in its entirety. Demand was made upon the petitioners for payment, which was refused.

To the Government's bill of complaint, each of the petitioners filed a separate plea, which denied generally the allegations of the complaint and specially pleaded a decision of the Board of Tax Appeals as constituting an abatement of the tax. (R. 43–45, 46–49.) From these special pleas and also from the evidence contained in the bill of exceptions (R. 71 *et seq.*) it appears that on July 9, 1926, the Company petitioned the Board of Tax Appeals for a review of the decision of the Commissioner rejecting the claim for abatement. (R. 159.) On March 4, 1927, an amended petition was filed which for the first time pleaded the statute of limitations as a bar to the collection of the tax. (R. 133–134, 135, *et seq.*) After a hearing the Board held that the collection of the tax was barred by the statute of limitations and that there was no deficiency for the year 1917. (R. 105, 116.) A petition for review of this decision of the Board was filed in the court below by the Commissioner on April 9, 1929. (R. 91.) This petition was dismissed on motion of the Commissioner on December 3, 1929 (R. 78), and the Board's decision became final.

To that part of petitioners' pleas setting up the decision of the Board of Tax Appeals the Govern-

ment filed demurrers. (R. 50–51.) These demurrers were sustained (R. 52–53), issue was joined on the remainder of petitioners' pleas, the case was tried before a jury, a verdict was returned for the Government, and judgment entered accordingly (R. 53). Motions for a new trial were overruled. (R. 175–176.) Upon appeal, the Circuit Court of Appeals affirmed the judgment, one judge dissenting. (R. 200–201.)

**ARGUMENT**

We believe that this case is governed in principle by the decision of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370. In that case the Barth Company, in consideration of the United States refraining from the collection of taxes outstanding against the Company for 1918 pending an adjudication of certain claims for abatement, executed and delivered to the Commissioner of Internal Revenue a surety bond, which bound it and its surety to pay "on notice and demand by the collector * * * any part of such tax found by the Commissioner to be due." At the time the claims for abatement were filed and the bond given, the statute of limitations had not run against the collection of the taxes. The Commissioner considered the claims for abatement but allowed them only in part. The Barth Company and its surety were notified and payment under the bond of the taxes as determined was demanded. Payment was

refused, and the United States instituted suit on the bond. The Barth Company and its surety demurred to the Government's petition on the ground that the action was not commenced within the time prescribed by certain statutes of limitations relating to suits or proceedings for the collection of taxes. This Court held that these statutes did not apply, saying (pp. 375, 376):

> The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective. * * * To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and

> he should not object to making good the contract by which he obtained the delay he sought.

In the instant case, at the time the claim for abatement was filed and the first bond was given, the statute of limitations, although about to run against collection of the additional taxes, had not yet run. On its face the bond shows clearly that the intent of the parties was to save the Government from any loss which might result from the delay occasioned by the permission given the Company to present additional information in support of its claim for abatement. At that time (March 13, 1923) the Board of Tax Appeals had not yet been created. It is, therefore, evident that the parties then contemplated that liability on the bond should depend upon the determination of the Commissioner of Internal Revenue on the claim for abatement. The second bond executed by the petitioner referred both to the first bond and the claim for abatement. It recited expressly that it was for the purpose of relieving the surety on the first bond of his obligation thereunder. But to protect the Government it also provided that it was executed for the further purpose of "securing the payment of any amount found to be due the United States government under the above Revenue Act," and also made provision for the deposit

by the Company as a pledge, in a Federal Reserve Bank, of $200,000 in Government bonds. The third bond, the one in suit, while not mentioning the first bond, did refer to the second bond as well as the claim for abatement, and it shows that the primary purpose for which it was given was to obtain the surrender of the Government bonds which the Company had deposited under the second bond, substituting therefor the obligation of a surety. The condition of both the second and third bonds was that the principal should pay "so much of the claim as is not abated."

Under the *Barth* decision, *supra*, there can be no question that liability under the first bond was not affected by the running of the statute against the collection of the taxes *qua* taxes. There is nothing in the two later bonds to indicate an intent of the parties to change the situation. The substitution of them for the original bond was manifestly permitted as an accommodation to the Company. These bonds were given after the Board of Tax Appeals had been created and the statutes permitted review by that Board of the action of the Commissioner on claims for abatement, and, under its power to determine deficiencies in taxes, the Board had jurisdiction to determine that there was no deficiency in tax in the instant case because the statute of limitations barred collection. But the

condition of the bond in suit must be given a meaning which will effectuate the intention of the parties. *Hill* v. *American Surety Co.,* 200 U. S. 197, 203; *Cooke* v. *Graham's Administrator,* 3 Cranch 229, 235. Bonds must be construed sensibly, and common sense forbids the conclusion that the parties contemplated that a decision of the Board that the taxes had abated on the ground that the statute had run against collection, met the condition of the bond. As the court below said (R. 194–195), the word "abate" used in the condition of the bond has "many shades of meaning," and it was there patently used in the sense of a finding which went not to the collectibility of the tax but to the legality of the assessment. Otherwise the second and third bonds were merely futile gestures, as collection of the tax was barred at the time they were delivered.

The Board in its opinion (R. 116) expressly recognized that its decision "in no wise disposes of any question arising as to liability on the bond," and its decision obviously went only to the enforceability of the tax as a tax. The liability of petitioners on the bond was in no wise affected by that decision, and we see no material difference between this case and the *Barth case.* While in this case the statute of limitations upon collection was not pleaded directly as a bar to this action, the effect of the plea of the Board's decision is the same in

substance and the principle of the *Barth case* is applicable. Should the contention of petitioners prevail, the statute of limitations will have prevented the enforcement of the contractual liability just as effectively as though it had been successfully pleaded as a direct bar. It would be accomplishing indirectly what the *Barth case* holds may not be done directly.

There are now pending before the various District Courts seven cases involving analogous questions, although the bonds involved in those cases vary in their phraseology. In *United States* v. *Martin Hotel Co.*, 52 F. (2d) 161, the District Court for Nebraska decided a substantially similar question adversely to the Government, and that case is now pending on the Government's appeal in the Circuit Court of Appeals for the Eighth Circuit. We are informed by the Bureau of Internal Revenue that there are other cases pending in the Bureau in which suits have not been filed. Aside from the instant case we are advised that the cases in which analogous questions are involved affect taxes amounting to approximately $350,000. There is no present conflict with decisions of other Circuit Courts of Appeals. Unless and until a conflict does develop there would seem to be no necessity for a review of the question by this Court.

## CONCLUSION

The decision of the court below was correct and the petition should be denied.

Respectfully submitted.

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APRIL, 1932.

## APPENDIX

APRIL 20, 1931.

Hon. AUGUSTUS BENNERS,
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Hon. JIM C. SMITH,
*United States Attorney.*

GENTLEMEN: Referring to the case of the *United States* v. *Gulf States Steel Company,* I think the *Barth case* controlling in favor of the plaintiff. In the instant case the bond sued on was given before the statute of limitations had been run against the collection of the tax. In the *Barth case* the Supreme Court held that "the limitations of Sec. 250 (d) has no application to a situation following a claim of abatement and the giving of a bond." The Court also said: "The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay sought." The condition of the bond was: "If the principal or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, etc." In view of the *Barth case,* I do not think the claim was abated by a determination of the Board of Tax Appeals that the statute of limitations had run against the collection of the tax, by distraint or

suit. If so construed it would be inconsistent with the holding of the *Barth case* that one purpose of giving the bond was "to prevent the running of time against the government." It would not do that if the limitations applied directly or indirectly through the determination of the Board of Tax Appeals as well to a suit on the bond as to the collection of the tax. The *Barth case* also holds that an action on the bond is a substituted remedy to the collection of the tax by suit or distraint and that the limitation applicable to a suit on the bond, if any, and not that applicable to the collection of the tax, is the appropriate one.

Entertaining this view, I think the United States is entitled to a judgment.

If the defendant has any remedy it would be based upon a redetermination by the Board of Tax Appeals on the merits and not upon a finding that there was no deficiency for 1917 tax because the statute of limitations had barred its collection.

I will sign an appropriate order when presented.

Respectfully,

W. I. GRUBB,
*District Judge.*

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No. 24

# In the Supreme Court of the United States

OCTOBER TERM, 1932

GULF STATES STEEL COMPANY AND NATIONAL SURETY COMPANY, PETITIONERS

*v.*

THE UNITED STATES

*ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Summary of argument | 8 |
| Argument: | |
| I. This case is controlled by the decision in *United States* v. *John Barth Co.*, 279 U. S. 370 | 10 |
| II. The decision of the Board of Tax Appeals that the taxpayer's liability for the tax as a tax is barred by the statute of limitations does not affect the petitioners' liability on the bond | 16 |
| Conclusion | 23 |
| Appendix A | 24 |
| Appendix B | 29 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *American Surety Co.* v. *Pauly*, 170 U. S. 133 | 16 |
| *Bort* v. *E. H. McCutchen & Co.*, 157 Fed. 182, certiorari denied, 209 U. S. 547 | 12 |
| *Caldwell* v. *United States Fidelity & Guaranty Co.*, 205 Ala. 463 | 12 |
| *Campbell* v. *Holt*, 115 U. S. 620 | 15 |
| *City of Topeka* v. *Federal Union Surety Co.*, 213 Fed. 958 | 16 |
| *Cooke* v. *Graham's Administrator*, 3 Cranch 228 | 13 |
| *Grafton* v. *Fidelity & Guaranty Co.*, 227 N. Y. 162 | 12 |
| *Gray Motor Co.* v. *United States*, 16 F. (2d) 367 | 10 |
| *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416 | 16 |
| *Hill* v. *American Surety Co.*, 200 U. S. 197 | 12 |
| *Maryland Casualty Co.* v. *Fowler*, 31 F. (2d) 881 | 16 |
| *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309, affirmed, 282 U. S. 434 | 15 |
| *Missouri, Kansas & Texas Railway Co.* v. *American Surety Co. of New York*, 291 Mo. 92 | 12 |
| *National Surety Co.* v. *McCormick*, 268 Fed. 185 | 16 |
| *Richardson* v. *County of Steuben*, 226 N. Y. 13 | 12 |
| *Roberts Sash & Door Co.* v. *United States*, 282 U. S. 812, affirming 69 C. Cls. 363 | 11 |
| *Royal Indemnity Co.* v. *Northern Ohio G. & S. Co.*, 100 Ohio St. 373 | 16 |
| *Ryan* v. *United States*, 19 Wall. 514 | 12 |

Cases—Continued. Page

*Southwestern Surety Ins. Co.* v. *United States Fidelity & Guaranty Co.*, 75 Okla. 232 ..... 12

*United States* v. *Charleston Lead Works*, 49 F. (2d) 281 ..... 15

*United States* v. *E. Hogshire, Son & Co.*, 37 F. (2d) 720 ..... 15

*United States* v. *John Barth Co.*, 279 U. S. 370 ..... 8, 9, 10, 11, 13, 14, 15, 18

*United States* v. *Lynch*, 192 Fed. 364 ..... 16

*United States* v. *Martin Hotel Co.*, 52 F. (2d) 161; 59 F. (2d) 549; petition for certiorari, No. 254, October Term, 1932 .. 18, 20

*United States* v. *Onken Bros. Co.*, 23 F. (2d) 367 ..... 10

*United States* v. *Pauling & Co.*, 297 Fed. 65 ..... 16

*United States* v. *Rennolds*, 27 F. (2d) 902 ..... 10

*United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552 ..... 23

Statutes:

Revised Statutes, sec. 3218 (U. S. C., Title 26, Sec. 147) ..... 13

Revenue Act of 1921, c. 136, Sec. 250, 42 Stat. 227, 265 ..... 24

Revenue Act of 1924, c. 234, Sec. 279, 43 Stat. 253, 300 (U. S. C., Title 26, Sec. 1063) ..... 24

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 56, 60, 64, 65—

Sec. 274 (U. S. C. Sup. V, Title 26, Sec. 1048 (a)) ..... 25

Sec. 279 (U. S. C. Sup. V, Title 26, Sec. 1051) ..... 26

Sec. 283 (U. S. C. Sup. V, Title 26, Sec. 1064) ..... 26

Sec. 284 (U. S. C. Sup. V, Title 26, Sec. 1065) ..... 27

Sec. 906(e) ..... 18

Revenue Act of 1928, c. 852, 45 Stat. 791, 855—

Sec. 273 (U. S. C. Sup. V, Title 26, Sec. 2273) ..... 28

Sec. 601 (U. S. C. Sup. V, Title 26, Sec. 1217) ..... 28

Miscellaneous:

Williston, Contracts, Vol. 1, Secs. 160–198 ..... 15

# In the Supreme Court of the United States

OCTOBER TERM, 1932

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GULF STATES STEEL COMPANY AND NATIONAL Surety Company, petitioners

*v.*

THE UNITED STATES

---

*ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The District Court for the Northern District of Alabama rendered no opinion. The opinion of the Circuit Court of Appeals (R. 109–115) is reported in 56 F. (2d) 43.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 19, 1932. (R. 119–120.) The petition for a writ of certiorari was filed March 23, 1932, and was granted April 25, 1932. (R. 123.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether a decision by the Board of Tax Appeals that the collection of income taxes was barred by the statute of limitations extinguishes liability upon a bond given in renewal of a bond delivered upon filing a claim for abatement of such taxes before the statute of limitations expired and conditioned upon the payment of so much of the tax as was not abated.

## STATUTES INVOLVED

The statutes involved are contained in Appendix A, *infra*, pp. 24–28.

## STATEMENT

This action was brought by the respondent against the petitioners as principal and surety on a bond given September 9, 1925, to the Collector of Internal Revenue for the District of Alabama in connection with a claim made by the Gulf States Steel Company (hereafter called the taxpayer) for the abatement of an additional assessment of income and excess profits taxes for 1917. The District Court sustained demurrers to a portion of the pleas of the petitioners (R. 29–30), issue was joined on the remaining pleas, and the case was tried before a jury and resulted in a verdict for the respondent. There is no dispute about the facts, which may be summarized as follows:

The taxpayer filed its income and profits tax return for 1917 on March 28, 1918, and on June 25,

1918, paid the tax shown, $989,790.57. (R. 2–3, 24–25, 26–27, 31.) Upon examination of the return the Commissioner of Internal Revenue determined and assessed an additional tax of $153,815.30. The additional assessment appeared on the April, 1921, list. (R. 31–33.)

On May 6, 1921, the taxpayer filed a claim for abatement of the additional assessment of $153,815.30, in which it made certain contentions relative to the computation of invested capital by the Commissioner and with respect to the deduction allowed by the Commissioner in determining income subject to the excess-profits tax. (R. 34–36.)

On March 13, 1923 (fifteen days before collection of the additional tax would have been barred by the five-year period of limitations under Section 250 (d) of the Revenue Act of 1921, *infra*, p. 24), the claim for abatement had not been acted upon and the Collector of Internal Revenue was demanding payment of the tax. (R. 3, 13, 25, 26.) To secure a delay pending consideration of the claim, the taxpayer, as principal, and the American Surety Company, as surety, delivered their bond for $175,350 to the collector on March 13, 1923. (R. 12–13.) The condition of the bond was as follows (R. 13):

> The condition of the above obligation is such that, if the said Gulf States Steel Company will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and ex-

> pense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand Eight Hundred Fifteen and 30/100 Dollars ($153,815.30), claimed of it under the War Revenue Act of 1917, pending the filing, by the said Gulf States Steel Company of additional facts and information in support of a claim for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect.

On April 3, 1925, while the claim for abatement was still undetermined, in order to secure the release of the American Surety Company as surety upon the bond of March 13, 1923, the taxpayer executed another bond, pledging $200,000 in Government bonds as security for the performance of its obligation. (R. 15–16.) The condition of this bond was as follows (R. 13–14):

> The condition of the above obligation is such that, whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand Three Hundred and Fifty Dollars ($175,350.00), and in favor of W. E. Snead, Collector of Internal Revenue for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March, 1923, and was given in support of a

> claim for the abatement of assessments, penalties, and interests, under the Revenue Act of 1917. Being desirous of relieving the above bound surety Company and further securing the payment of any amount found to be due the United States government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect.

On September 9, 1925, the claim for abatement still not having been acted upon, the taxpayer, as principal, and the petitioner National Surety Company, as surety, executed the bond which is sued upon in this action. The condition of this bond was as follows (R. 18–19):

> The condition of the above obligation is such that, whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with the Collector of Internal Revenue for the District of Alabama at

> Birmingham. On the third day of April, 1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties, and interest as is not abated. In lieu of surety on the above bond the said company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following-described United States, Fourth Liberty Loan 4¼% Gold Bonds of 1933–8 series, being of the par value of $200,000.00 (coupons), numbers * * *. The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Alabama. Now, therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to the said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by Law, then this obligation shall be of no effect. Otherwise it shall remain in full force.

On December 4, 1925, the Commissioner notified the taxpayer of the finding of a liability in excess of that previously assessed, that its claim for abatement would be rejected, and that the Collector would be notified of this adjustment within thirty days unless during that period evidence should be furnished showing its incorrectness. (R. 37–38.)

On May 12, 1926, the Commissioner advised the taxpayer that it was proposed to reject the claim in its entirety and that, in accordance with the provisions of Section 283 (e) or (k) of the Revenue Act of 1926 (*infra,* pp. 26–27), he was given sixty days within which to file an appeal with the Board of Tax Appeals. (R. 39–40.)

On July 11, 1930, the Collector notified the taxpayer and the National Surety Company of the action of the Commissioner in rejecting the claim, of the credits applied against the assessment by reason of overpayments for other years, and of a balance due of $132,795.57, with interest at 6 per cent from April 2, 1921, to the extent of the $200,000 secured by the bond. (R. 11, 31.) Upon their refusal to pay, this suit for $200,000 with interest from July 11, 1930, was instituted against the taxpayer and the National Surety Company on August 25, 1930. (R. 1.)

To the Government's complaint each of the petitioners filed a separate plea, which denied generally the allegations of the complaint and specially pleaded a decision of the Board of Tax Appeals as constituting an abatement of the tax. (R. 24–26, 26–28.) From these special pleas and also from the evidence contained in the bill of exceptions (R. 41 *et seq.*) it appears that on July 9, 1926, the Company petitioned the Board of Tax Appeals for a review of the decision of the Commissioner rejecting the claim for abatement. (R. 91.) On

March 4, 1927, an amended petition was filed which for the first time pleaded the statute of limitations as a bar to the collection of the tax. (R. 76–83.) After a hearing the Board held that the collection of the tax was barred by the statute of limitations and that there was for this reason no deficiency for the year 1917. (R. 45–46, 56, 58, 59, 62–66; 12 B. T. A. 1244.) A petition for review of this decision of the Board was filed in the court below by the Commissioner on April 9, 1929. (R. 51.) This petition was dismissed on motion of the Commissioner on December 9, 1929 (R. 45), after the decision of this court in *United States* v. *John Barth Co.*, 279 U. S. 370. The Board's decision thereupon became final.

To that part of the petitioners' plea setting up the decision of the Board of Tax Appeals the Government filed demurrers. (R. 28–29.) These demurrers were sustained (R. 29–30), issue was joined on the remainder of the petitioners' pleas, the case was tried before a jury, a verdict was returned for the Government, and judgment was entered accordingly (R. 29–30). Upon appeal the Circuit Court of Appeals affirmed the judgment, one judge dissenting. (R. 109–119.)

## SUMMARY OF ARGUMENT

### I

This case is governed in principle by the decision in *United States* v. *John Barth Co.*, 279 U. S. 370. In that case this Court held that the statute

of limitations relating to suits or proceedings for the collection of taxes did not bar a suit brought on a bond executed prior to the running of the statute, and binding the taxpayer and its surety to pay "any part of such tax found by the Commissioner to be due." The bond involved in this case, when properly interpreted in the light of the two earlier bonds which it succeeded, should be given the same effect as the bond before this Court in the *Barth* case.

Under the decision of this Court in the *Barth* case, it is plain that liability under the first bond was not affected by the running of the statute against the collection of the taxes *qua* taxes. There is nothing in the two later bonds to indicate an intention of the parties to change the situation. The fact that the third bond, upon which the present suit is based, was given after the statutory period for collection of the tax had expired, does not distinguish this case from the *Barth* case. For the third bond was but the ultimate instrument in a continuous series which had its origin before the expiration of the statutory period.

II

The decision of the Board of Tax Appeals that the taxpayer's liability for the tax as a tax was barred by the statute of limitations does not affect the petitioners' liability on the bond. The decision of the Board that collection of the tax was barred

affords no basis of distinction from the *Barth* case, where it appeared that collection of the tax was barred. Although the Board in form decided that there was no deficiency in tax, in substance it decided only that the liability for additional taxes was no longer enforcible as such. The Board's decision did not have the effect of abating the tax within the meaning of the bonds given in this case.

Nor was the decision of the Board a final determination of the present controversy which could only be reviewed on direct appeal from the Board's decision. The Board had no jurisdiction to determine the liability on the bond, and it expressly stated in its opinion that its decision "in no wise disposes of any question arising as to the liability on the bond." The question whether the giving of the bond operated as a waiver to extend the period for collection of the tax as such (which was decided by the Board) is not the same as the question whether this suit on the bond can be maintained.

## ARGUMENT

### I

### THIS CASE IS CONTROLLED BY THE DECISION IN UNITED STATES *v.* JOHN BARTH CO., 279 U. S. 370

We believe that this case is governed in principle by the decision of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370.[1] In that case the

[1] Other cases to the same effect are *Gray Motor Co.* v. *United States*, 16 F. (2d) 367 (C. C. A. 5th); *United States* v. *Onken Bros. Co.*, 23 F. (2d) 367 (D. Wyo.); *United*

Barth Company, in consideration of the United States refraining from the collection of taxes outstanding against the company for 1918 pending a decision on certain claims for abatement, executed and delivered to the Commissioner of Internal Revenue a surety bond, which bound it and its surety to pay "on notice and demand by the Collector * * * any part of such tax found by the Commissioner to be due." At the time claims for abatement were filed and the bond was given the statute of limitations had not run against the collection of the taxes. The Commissioner considered the claims for abatement but allowed them only in part. The Barth Company and its surety were notified and payment under the bond of the taxes as determined was demanded. When payment was refused, the United States instituted suit on the bond. The Barth Company and its surety demurred to the Government's petition on the ground that the action was not commenced within the time prescribed by the provisions of certain statutes of limitations relating to suits or proceedings for the collection of taxes. This Court held that these statutes did not apply, saying (pp. 375, 376):

> The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded

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*States* v. *Rennolds*, 27 F. (2d) 902 (S. D. N. Y.). See also *Roberts Sash & Door Co.* v. *United States*, 282 U. S. 812, affirming 69 C. Cls. 363.

> to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective. * * * To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

Bonds, like other contracts, are to be construed in the light of surrounding circumstances,[2] and we be-

[2] *Hill* v. *American Surety Co.*, 200 U. S. 197; *Bort* v. *E. H. McCutchen & Co.*, 157 Fed. 182 (C. C. A. 8th); *Richardson* v. *County of Steuben*, 226 N. Y. 13; *Caldwell* v. *United States Fidelity & Guaranty Co.*, 205 Ala. 463; *Southwestern Surety Ins. Co.* v. *United States Fidelity & Guaranty Co.*, 75 Okla. 232; *Missouri, Kansas & Texas Ry. Co.* v. *American Surety Co. of New York*, 291 Mo. 92. The purpose of the bond is to be considered (*Ryan* v. *United States*, 19 Wall. 514; *Grafton* v. *Fidelity & Guaranty Co.*, 227 N. Y. 162) and the court may depart from the letter of the condition of the

lieve that the bond involved in this case, when properly interpreted in the light of the two earlier bonds which it succeeded, can not be distinguished from the bond before this Court in the *Barth* case.

In the present case, at the time the claim for abatement was filed and the first bond was given, the statute of limitations, although about to run against the collection of additional taxes, had not yet run. On its face the bond shows clearly that the intention of the parties was to save the Government from any loss which might result from the delay occasioned by the permission given the company to present additional information in support of its claim for abatement.[8]

At the time this first bond was given (March 13, 1923) the Board of Tax Appeals had not been created. It is therefore evident that the parties then contemplated that liability on the bond should depend only upon the determination by the Com-

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bond to carry into effect the intention of the parties. *Cooke v. Graham's Administrator*, 3 Cranch, 228.

[8] The form of the condition in this first bond was to indemnify the Collector for any loss, cost, damage, and expense which he might incur as the result of allowing the taxpayer to withhold the payment of $153,815.30 taxes due. But under Section 3218 of the Revised Statutes (U. S. C., Title 26, Sec. 147), the Collector was personally responsible for the collection of the tax, and the promise was thus in substance one to pay the tax found due. There was no material difference between the condition of the first bond and that of the second, which secured "the payment of any amount found to be due the United States government." (R. 14.)

missioner of Internal Revenue on the claim for abatement.

The second bond executed by the petitioner referred both to the first bond and to the claim for abatement. It recited expressly that it was for the purpose of relieving the surety on the first bond of its obligation thereunder. But to continue the protection to the Government, it also provided that it was executed for the further purpose of "securing the payment of any amount found to be due the United States Government under the above Revenue Act," and also made provision for the deposit by the company as a pledge, in a Federal Reserve bank, of $200,000 in Government bonds.

The third bond, the one upon which suit was brought, while not mentioning the first bond, did refer to the second bond as well as the claim for abatement, and it showed that the primary purpose for which it was given was to obtain the surrender of the Government bonds which the company had deposited under the second bond, substituting therefor the obligation of a surety. The condition of both the second and third bonds was that the principal should pay "so much of the claim as is not abated."

Under the decision of this Court in the *Barth* case, *supra*, it is plain that liability under the first bond was not affected by the running of the statute against the collection of the taxes *qua* taxes. There is nothing in the two later bonds to indicate an in-

tent of the parties to change the situation. It is plain that the first bond was given for the purpose of delaying the collection of taxes asserted against the taxpayer and that the second and third bonds were but continuations of the first, and had no purpose but to change the security given the United States in support of the taxpayer's obligation. The language of this Court in the *Barth* case seems to apply directly to this case (279 U. S. at 376):

> The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

The fact that the third bond, upon which the present suit is based, was given after the statutory period for collection of the tax had expired does not distinguish this case from the *Barth* case.[4] For the third bond was but the ultimate instrument in a continuous series which had its origin

[4] Recovery on a bond given after the statutory period has expired has been allowed. *United States* v. *E. Hoyshire, Son & Co.*, 37 F. (2d) 720 (E. D. Va.). See also *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309, affirmed, 282 U. S. 434, recognizing the principle that a moral obligation to pay a valid debt in the form of a tax is a sufficient legal consideration for a subsequent new promise to pay the tax either before or after the bar has become complete. This is the generally accepted rule as to all debts. *Campbell* v. *Holt*, 115 U. S. 620; 1 Williston, Contracts, Secs. 160–198. But in *United States* v. *Charleston Lead Works*, 49 F. (2d) 281 (E. D. S. C.), recovery was denied.

before the expiration of the statutory period. Nor is it material that the present surety on the bond did not become a party to the bond until after the statutory period for the collection of the tax had expired. For the surety's liability is measured by that of its principal, the taxpayer, and the taxpayer's liability has existed continuously since the execution of the first bond.[6]

## II

### THE DECISION OF THE BOARD OF TAX APPEALS THAT THE TAXPAYER'S LIABILITY FOR THE TAX AS A TAX IS BARRED BY THE STATUTE OF LIMITATIONS DOES NOT AFFECT THE PETITIONERS' LIABILITY ON THE BOND

The petitioners' chief defense to this action on the bond is based on the fact that the Board of Tax Appeals has determined that the tax can not be collected because of the statute of limitations. We believe that this defense is without merit, since the very purpose of the first bond and of the two which succeeded it was to guarantee the payment of taxes

[6] The modern cases are practically uniform in holding that the rule of strict construction of the obligation of a surety does not apply to compensated surety companies. *Maryland Casualty Co.* v. *Fowler*, 31 F. (2d) 881 (C. C. A. 4th); *United States* v. *Pawling & Co.*, 297 Fed. 65 (C. C. A. 3rd); *National Surety Co.* v. *McCormick*, 268 Fed. 185 (C. C. A. 7th); *City of Topeka* v. *Federal Union Surety Co.*, 213 Fed. 958 (C. C. A. 8th); *United States* v. *Lynch*, 192 Fed. 364 (D. Del.); *Royal Indemnity Co.* v. *Northern Ohio G. & S. Co.*, 100 Ohio St. 373. See also *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416. Most of the decisions cited hold that the obligation of such sureties, like insurance contracts, are to be construed most strongly against the surety. See *American Surety Co.* v. *Pauly*, 170 U. S. 133.

due the United States, even if the statute of limitations against their collection as taxes should run.

When the first bond was given, the Board of Tax Appeals had not been created, and the first bond, and those which followed it, must accordingly be construed with this fact in mind. Since the Board did not exist, the parties could not have intended that liability on the bond should depend upon any action which the Board might take. This argument applies to the second and third bonds as well as to the first, since their language discloses plainly that the purpose of all was the same.

The court below held that after the creation of the Board, liability upon the bond might depend upon the action of the Board in reviewing the Commissioner's rejection of the claim on the merits. This is equivalent to holding that the condition of the bond was that the principal and surety would pay the amount of the tax which was not abated as the result of a decision on the merits of the claim. But in the present case the taxpayer did not obtain a decision from the Board on the merits of its case. By relying upon the statute of limitations as a defense before the Board, the taxpayer voluntarily surrendered its right to have the Board pass upon the merits of the tax and thus left the decision of the Commissioner as the final decision on the merits.

It is plain that the parties did not intend the obligation of these bonds to pay "so much of the amount of the claim as is not abated" to be construed as merely an obligation to pay such amount

as the Board found could be collected within the statute of limitations. Such an obligation would have been worthless since collection of the tax as a tax was already barred at the time the second and third bonds were given. The only reasonable construction of the bond in suit is that it required the principal and the surety to pay the amount of tax found due as the result of a decision on the merits of the claim.

The decision of the Board that collection of the tax was barred is certainly no better defense than the *fact* that collection of the tax was barred in the *Barth* case. As the District Judge concluded in the present case (R. 110; see Appendix B, *infra*, pp. 29–30): "The finding of the Board that limitation had run added nothing to the fact that it had."

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In urging that the Board's decision constitutes a bar to this action, the petitioners rely upon the provision in Section 906 (e) of the Revenue Act of 1926, as amended by Section 601 of the Revenue Act of 1928 (*infra*, p. 28) that the decision of the Board to the effect that the assessment or collection of a tax is barred by the statute of limitations shall be considered as its decision that there is no deficiency in respect of such tax. This question was recently considered by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Martin Hotel Co.*, 59 F. (2d) 549, now pending on petition for certiorari, No. 254, October Term, 1932, where the court said (p. 552):

Had the Board of Tax Appeals determined that, upon the merits, there were no deficiencies in corporate income taxes for the year 1919, there might be some substantial basis for holding that its decision must, under the terms of the escrow agreement, be regarded as the final determination of the Commissioner, and that therefore the certification by the Collector did not fix the taxpayers' liability or the obligation of the bank under the escrow agreement, regardless of the fact that the agreement provided that such certification was to be final. Considering, however, the substance of what was decided by the Board, and disregarding mere form, the action of the Board constitutes nothing more than a finding that the liability of the taxpayers for additional taxes for 1919, as determined by the Commissioner, was no longer enforceable as such. It did not disturb the determination of the Commissioner as to the amount of additional taxes which were due and unpaid for the year 1919, and the payment of which was secured by the deposit. It is our opinion that the Commissioner's determination, certified to the bank by the collector of internal revenue, must stand as fixing the liability of the taxpayer under the provisions of the escrow agreement, and that the decision of the Board of Tax Appeals had no effect upon the right of the government to have recourse against the deposit in the hands of the bank.

Although the condition of the agreement in the *Martin Hotel Co.* case was in substance that the

amount deposited in escrow should be held until the Commissioner finally determined the additional taxes due, we do not think that this difference renders the court's conclusion as to the effect of the Board's decision inapplicable to the case at bar. The court there held that the mere form of the Board's decision should be disregarded and that in substance all that happened was that the Board found the liability for additional taxes was no longer enforcible as such. The same reasoning applies here.[6] The Board's decision did not have the effect of abating the tax within the meaning of the bond given in this case any more than it had the effect of finally determining the tax to be due within the meaning of the *Martin Hotel Co.* case.

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The petitioners also lay stress on the fact that the condition of the bond sued on is similar to that provided for bonds given in connection with jeopardy assessments under Section 279 (a) of the Revenue Act of 1924 (*infra*, p. 24); Section 279 (f) of the Revenue Act of 1926 (*infra*, p. 26); and Section 273 (f) of the Revenue Act of 1928 (*infra*, p. 28). It is pointed out that these sections recognize as abating the tax the decision of the Board that there is no deficiency. It is suggested that if

[6] In the court below petitioners relied upon the decision of the District Court in the case of *United States* v. *Martin Hotel Co.*, 52 F. (2d) 161, which was reversed by the Circuit Court of Appeals for the Eighth Circuit. The petitioners are not in a position to claim that the case is not in point because it was reversed in the Circuit Court of Appeals and is cited against them.

the decision of the Circuit Court of Appeals is permitted to stand, taxpayers who have furnished bonds in accordance with the requirements of these provisions will be denied the benefit of the statute of limitations, irrespective of whether or not the statute ran before the bonds were given. This was the view of Judge Sibley in his dissenting opinion in the court below.

The language of the condition of the bond in this case is not the same as the language of the condition of bonds given under Section 273 (f) of the Revenue Act of 1928 and the corresponding provisions of previous Revenue Acts. Under the latter the bond is "conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final." In the bond in suit the obligation is to pay "so much of the amount of the claim as is not abated."

In view of this difference in language, we do not think it is necessary for this Court to consider what would be the result if the bond had been given under Section 273 (f) of the Revenue Act of 1928 or similar provisions of earlier statutes. Of course, the petitioners do not suggest that the bond in suit was such a bond. The assessment was made long before the Board was created, and the third bond was given September 9, 1925, while it was not until May 12, 1926, that the Commissioner notified the taxpayer of the rejection of the claim and advised him of his right to appeal from this rejection to the Board.

Finally, it is argued by the petitioners that the Board held that the bond was not a waiver of the statute and that that decision could only be reviewed on appeal. It is urged that the decision of the Board has become final (since the Commissioner's appeal has been dismissed) and that it is not subject to collateral attack in this suit.

But the Board in its opinion (R. 66) expressly recognized that its decision "in no wise disposes of any question arising as to liability on the bond." The question whether the giving of the bond operated as a waiver to extend the period for collection of the tax as such is not the same as the question whether this suit on the bond can be maintained.

The Board had no jurisdiction to pass upon the right of the Commissioner to recover on the bond. Its jurisdiction was limited to a review of the Commissioner's determination of a deficiency in tax. The taxpayer's petition and amended petition to the Board sought "a redetermination of the deficiency." (R. 91–96, 78–83.) Not a word was said about a redetermination of any question of liability of a contractual character. In the amended petition it was for the first time contended (R. 81–82; Par. d–1) that the statute of limitations was effective to prevent a collection of the deficiency which the Commissioner had proposed—not that the statute had run when the tax was assessed or when the contractual liability with respect to it was assumed.

The Board's decision was no broader than the taxpayer's petition. It decided not that the right

to collect on the bond was barred, but that the right to collect the tax was barred. Under the decision of this Court in the *Barth* case, *supra*, it is plain that these two rights are not equivalent. See also *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552.

It is plain, therefore, that the contention that the Government is seeking to subject the Board's decision to an improper collateral attack in this proceeding is without foundation. There is no basis for the application of a principle akin to *res judicata*, since (a) the parties in the two proceedings are not the same, (b) the Board had no jurisdiction to determine the liability on the bond, and (c) the Board expressly stated that its decision did not consider the question of liability on the bond.

### CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*
G. A. YOUNGQUIST,
*Assistant Attorney General.*
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
HELEN R. CARLOSS,
*Special Assistants to the Attorney General.*
ERWIN N. GRISWOLD,
*Attorney.*

OCTOBER, 1932.

## APPENDIX A

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 300:

> SEC. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or

of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim. (U. S. C., Title 26, Sec. 1063.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 56, 60, 64, 65:

SEC. 274. (b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment. (U. S. C., Sup. V, Title 26, Sec. 1048 (a).)

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing. (U. S. C., Sup. V, Title 26, Sec. 1048 (c).)

SEC. 279. (f) When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in subdivision (j) of this section. (U. S. C., Sup. V, Title 26, Sec. 1051.)

SEC. 283. (e) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be

collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section. (U. S. C., Sup. V, Title 26, Sec. 1064.)

* * * * *

(k) Where before the enactment of this Act a jeopardy assessment has been made under subdivision (d) of section 274 of the Revenue Act of 1924 (whether of a deficiency in the tax imposed by Title II of such Act or of a deficiency in an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section) all proceedings after the enactment of this Act shall be the same as under the Revenue Act of 1924 as amended by this Act, except that— (U. S. C., Sup. V, Title 26, Sec. 1064.)

* * * * *

SEC. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except— (U. S. C., Sup. V, Title 26, Sec. 1065.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 855:

SEC. 273. (f) *Bond to stay collection.*—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in section 297. (U. S. C., Sup. V, Title 26, Sec. 2273.)

SEC. 601. BOARD OF TAX APPEALS—PROCEDURE

Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows:

* * * * *

(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax. (U. S. C., Sup. V, Title 26, Sec. 1217.)

## APPENDIX B

APRIL 20, 1931.

Hon. AUGUSTUS BENNERS,
*Attorney for Defendant.*

Hon. JIM C. SMITH,
*United States Attorney.*

GENTLEMEN: Referring to the case of the *United States* v. *Gulf States Steel Company*, I think the *Barth* case controlling in favor of the plaintiff. In the instant case the bond sued on was given before the statute of limitations had been run against the collection of the tax. In the *Barth* case the Supreme Court held that "the limitations of Sec. 250 (d) has no application to a situation following a claim of abatement and the giving of a bond." The Court also said: "The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay sought." The condition of the bond was: "If the principal or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, etc." In view of the Barth case, I do not think the claim was abated by a determination of the Board of Tax Appeals that the statute of limitations had run against the collection of the tax, by distraint or suit. If so construed, it would be inconsistent with the holding of the *Barth* case that one purpose of giving the

bond was "to prevent the running of time against the government." It would not do that if the limitations applied directly or indirectly through the determination of the Board of Tax Appeals as well to a suit on the bond as to the collection of the tax. The *Barth* case also holds that an action on the bond is a substituted remedy to the collection of the tax by suit or distraint and that the limitation applicable to a suit on the bond, if any, and not that applicable to the collection of the tax, is the appropriate one.

Entertaining this view, I think the United States is entitled to a judgment.

If the defendant has any remedy it would be based upon a redetermination by the Board of Tax Appeals on the merits and not upon a finding that there was no deficiency for 1917 tax because the statute of limitations had barred its collection.

I will sign an appropriate order when presented.

Respectfully,

W. I. GRUBB,
*District Judge.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

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## No. 24

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GULF STATES STEEL COMPANY and
NATIONAL SURETY COMPANY,
*Petitioners,*

v.

THE UNITED STATES OF AMERICA,
*Respondent.*

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## BRIEF OF AMICUS CURIAE IN BEHALF OF MARTIN HOTEL COMPANY.

---

JOHN E. HUGHES,
First National Bank Building,
Chicago,
*Amicus Curiae.*

## TABLE OF CONTENTS.


| | Page |
|---|---|
| Argument | 3 |
| The Statute expressly forbids an action such as that here brought under the circumstances here present | 3 |
| A recovery cannot be had on a written contract unless the same was breached. There is in this case no breach | 4 |
| To permit the United States to recover in an action such as this would be unjust in nearly all cases, and in some cases disastrous to taxpayers | 5 |
| Foreword | 2 |
| Points to be urged | 2 |


## TABLE OF CASES CITED.


| | |
|---|---|
| Excelsior Motor Manufacturing & Supply Company, 5 B. T. A. 582, 43 F. (2d) 968 | 6 |
| Graham v. Goodcell, 282 U. S. 408 | 3 |
| Old Colony Trust Company v. Commissioner, 279 U. S. 716 | 4 |
| The United States v. John Barth Company, 279 U. S. 370 | 4, 5 |

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*Petitioners,*

v.

THE UNITED STATES OF AMERICA,

*Respondent.*

---

## BRIEF OF AMICUS CURIAE IN BEHALF OF MARTIN HOTEL COMPANY.

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*May It Please the Court:*

Comes now the undersigned and respectfully moves that this Honorable Court grant leave to file the annexed brief as *amicus curiae*. This brief is filed in behalf of the Martin Hotel Company, et al., pending Number 254 herein. Counsel for both parties have consented to the filing of this brief.

## FOREWORD.

In the case of the Martin Hotel Company, in which the opinion of the Board of Tax Appeals is reported in *18 B. T. A. 826*, the opinion of the District Court in *52 F. (2d) 161*, and the opinion of the Circuit Court of Appeals in *59 F. (2d) 549*, a petition for a writ of certiorari has been filed and is Number 254 herein, this term. It is thought that the Court will await the decision of the *Gulf States Steel Case* before disposing of the petition in the *Martin Hotel Company Case* and in behalf of that Company this brief is filed.

## POINTS TO BE URGED.

It is respectfully submitted that the present action cannot be maintained by the United States for the following reasons:

(1) The Statutes expressly forbid an action such as this under the circumstances here present.

(2) A recovery cannot be had on a written contract unless the same was breached and there is in this case no breach of the contract.

(3) To permit the United States to recover in an action such as this would be unjust in nearly all cases and in some cases disastrous to taxpayers.

These points will be argued in the order in which they are above set forth.

## ARGUMENT.

At the outset of the argument it is well to make clear that the bonds were not entered into in these cases to prevent the Statute of Limitations running against the United States. The Treasury Department ruled that if it made an assessment in time there was no limitation on its right to collect the tax so assessed. It was not until the decision of this Court in the *Bowers case* on February 21, 1927, that the Department knew its view was erroneous. This is a matter of public record and is clearly set forth in the opinion of this Court in *Graham v. Goodcell, 282 U. S. 408,* at page *417.* It is thus obvious that the Treasury Department did not take these bonds to prevent a limitation running which it believed did not run. It took them solely to guard itself against the taxpayer's inability to pay and for no other reason.

### THE STATUTE EXPRESSLY FORBIDS AN ACTION SUCH AS THAT HERE BROUGHT UNDER THE CIRCUMSTANCES HERE PRESENT.

*Section 274 (b) of the Revenue Act of 1926 (Title 26, U. S. C. A., Sec. 1048 (a); 44 Stat. 55)* provides in the applicable part as follows:

> "No part of the amount determined as a deficiency by the Commissioner, but disallowed as such by the decision of the Board, which has become final, shall be assessed or collected by distraint or by proceeding in court, with or without assessment."

The present proceeding in Court was brought for the exact amount "determined as a deficiency by the Com-

missioner, but disallowed as such by the decision of the Board, which has become final." The proceeding is clearly forbidden by the above provision of the Act. The Government's remedy was to have appealed the decision of the Board of Tax Appeals to the United States Circuit Court ofAppeals on the ground that the Board erred in failing to hold that the bond constituted a waiver. It did not do so and it has therefore lost the right to question this decision *(Old Colony Trust Company v. Commissioner, 279 U. S. 716).*

The case of *The United States v. John Barth Company, 279 U. S. 370,* on which the Circuit Court of Appeals and the District Judge relied in the case at bar, is not in point. In that case no appeal had been taken to the United States Board of Tax Appeals and the above Statute had no application.

## A RECOVERY CANNOT BE HAD ON A WRITTEN CONTRACT UNLESS THE SAME WAS BREACHED. THERE IS IN THIS CASE NO BREACH.

It is axiomatic that a recovery cannot be had on a written contract unless the contract has been breached to the plaintiff's damage. In many of these cases the contract was to pay the tax eventually found due. If the Board of Tax Appeals has found no tax due and its decision has become final, it follows that there is no breach of the contract. Furthermore, in many of these cases, if at the time the contracts were entered into the taxpayers had paid the taxes instead of signing contracts they could have recovered them with interest under the provisions of *607 of the Revenue Act of 1928.*

In such case it is manifest that the Government has sustained no damage by reason of the contract but, on the contrary, is better off because it does not have to refund the tax plus interest thereon.

Again the case of *The United States v. John Barth Company, 279 U. S. 370,* is not in point. In that case the plaintiff's petition pleaded a breach of the contract and it came to this Court on a demurrer which admitted all facts well pleaded, including the breach of the contract and the damage alleged to result therefrom. Furthermore the *Barth case* is not in point because the Court expressly held in that case that the Statute of Limitations had not run for the reason that the bond was a waiver. In the case at bar it is conclusively settled by the decision of the Board of Tax Appeals that the Statute has run.

**TO PERMIT THE UNITED STATES TO RECOVER IN AN ACTION SUCH AS THIS WOULD BE UNJUST IN NEARLY ALL CASES, AND IN SOME CASES DISASTROUS TO TAXPAYERS.**

In the case of the *Martin Hotel Company, Number 254* herein, the taxpayer contested the tax not only on the ground of the Statute of Limitations but also on other issues going to the merits. The Board of Tax Appeals, in order to save time, split the issues and tried and decided the issue of the Statute of Limitations first. If the Government had appealed the Board's decision in that case to the Circuit Court of Appeals and that Court had reversed the Board and held that the bond was a waiver of the Statute of Limitations, then the case would have come back to the Board of Tax Appeals for trial on the merits. On the other hand, if this ac-

tion is sustained, the taxpayer, by virtue of the Government's failure to appeal the decision of the Board of Tax Appeals, is forever denied an opportunity to raise any question on the merits and in many cases taxpayers will have to pay taxes which they do not owe because they did not have the alleged income.

In the case of *Excelsior Motor Manufacturing & Supply Company, 5 B. T. A. 582,* the taxpayer appealed to the Board of Tax Appeals from a deficiency of $66,556.49. The Board of Tax Appeals on points wholly different from the Statute of Limitations and going to the merits of the case (an admitted inventory mistake and the absence of fraud) reduced this deficiency to $23,171.44. The taxpayer took an appeal from this decision to the Circuit Court of Appeals for the Seventh Circuit, and in *43 F. (2d) 968* it was held that the collection of the deficiency found by the Board was outlawed. That decision has become final. The Government has now brought a suit in the United States District Court at Chicago on a bond, not for the sum to which the deficiency had been reduced by the Board of Tax Appeals on points other than the Statute of Limitations, but for the entire sum originally claimed with respect to which the bond was given. It claims the suit is on a written contract and that the obligations of written contracts are not affected by any decisions which the Board of Tax Appeals may make in tax matters. It is such hair-splitting distinctions and such technicalities which frequently make laymen disgusted with law and which we must look to this Court to brush away.

To permit recovery in some of these suits would be disastrous to taxpayers because they cannot contest the

tax on the merits and because in this time of depression they have not the money to pay it.

Most of these jeopardy assessments were made hastily and consequently were made for the maximum amount by some clerk in the Bureau of Internal Revenue which might be claimed by the Government from the taxpayer. In the overwhelming majority of cases they were reduced on the merits upon further consideration in the Bureau.

All of which is respectfully submitted,

JOHN E. HUGHES,
First National Bank Building,
Chicago,
*Amicus Curiae. In Behalf of Martin Hotel Company, et al., No. 254 herein.*

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CHARLES ELMORE C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932

No. 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,
v.
THE UNITED STATES OF
AMERICA

## Petition for Rehearing

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932

No. 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,
v.
THE UNITED STATES OF AMERICA

## PETITION FOR REHEARING

The above named petitioners come now and respectfully petition this Honorable Court for a rehearing of said cause, and for a stay of the mandate pending such rehearing, for the following reasons, to-wit:

1. The Court concluded in its opinion (page 8) that the obligation of the bond sued upon contemplated the same protection to the Government afforded by the first bond given. This conclusion does not take into account the difference in wording of the two bonds. The first bond indemnified the Collector against all loss, etc., "to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector" of the tax assessed. The bond sued on, which was in a larger amount than the first bond, obligated the petitioners, one of which (the National Surety Company) was not a party to the first bond, to pay so much of the tax "as is not abated." Had the suit been upon the first bond, presumably the obligors on that bond could have interposed the defense that there had never been any liability on the merits for the tax claimed and if the defense had been proven it would have been established that the Collector had suffered no damage from the delay. It would seem clear that a collector who is prevented from collecting a tax that was never due because of delay has suffered no damage. This very valuable defense is not available on the bond sued on. The sole defense permitted by that bond was an abatement of the tax. Unless the tax had been abated, irrespective of the validity or correctness of the assessment, the obligors on this bond were liable. It is submitted that two bonds admitting of such different defenses could not mean one and the same thing.

2. The Court apparently concluded that the

petitioners rested their contention that the tax had been abated by the decision of the United States Board of Tax Appeals solely on Section 906(e) of the Revenue Act of 1924 as amended by the Acts of 1926 and 1928, and as that Section did not become law until after the bond was given, the abatement referred to in the bond "depended upon the future decision of the Commissioner" (opinion, page 8-9). In this respect the Court seems to have misapprehended or overlooked the petitioners' argument as presented at pages 11-13 of their brief. Section 906(e) prescribed that the effect of a decision on limitation was equivalent to a decision on the merits and was cited as the construction Congress put on the effect of such a decision, when it had not materially changed the power given to the Board in 1924 to reconsider the Commissioner's final determinations of tax liability. Ignoring this Section, however, the Board was created in 1924 by the Act of that year. It was in existence when the bond sued upon was given in 1925. That bond was in the exact language of section 279(a) of the Revenue Act then in effect, which characterized a decision by the Board of no deficiency as an abatement of the tax and presumably was given with that provision in mind. The Board was created to redetermine deficiencies thereafter finally determined by the Commissioner. There has never been any question but that the deficiency for 1917 was not finally determined by the Commissioner until May 12, 1926. From the outset the Board had redetermined deficiencies on the ground of the Statute of Limitations raised in

the Board. See *National Refining Co. v. Commissioner,* 1 B. T. A. 236, decided December 23, 1924, almost one year before the bond sued on in this cause was given. In the above case the Board said at page 239:

> "There is no more cause to prevent it pleading Section 277(a) (2) of the Revenue Act of 1924 as a reason why a deficiency should not be determined against it than there is to deny it the right to plead any other section of the Act."

The Board had likewise redetermined taxes assessed before the Board was created where the final determination was made after the Act took effect. *Appeal of Mitchel,* 1 B. T. A. 143, decided Dec. 11, 1924; *Appeal of Boston Structural Steel Co.,* 1 B. T. A. 602, decided Feb. 17, 1925. See also Note 7 to opinion of this Court in *Brown & Sons Co. v. Burnett,* 282 U. S. 283, 289.

It is submitted that in view of these facts the parties did not intend to waive their right to have the tax liability determined by the Board or to place its final determination in the hands of the Commissioner. Neither the bond nor any other document restricted the abatement of the tax to action by the Commissioner. Neither is the bond restricted to abatement on the merits. An abatement is all that is required. It is conceded that the decision of the Board prevented any collection of the tax as such. Irrespective of Section 906(e) of the 1924 Act as amended, or of Section 279(a) of the 1924 Act, the effect of this decision would seem

to constitute an abatement of the tax under the well-recognized definition of that term known to the parties when the bond was given. In substance, the only definition then known to the term in tax law is found in Funk & Wagnall's New Standard Dictionary and is set out in petitioners' brief at page 11, as follows: "To remit all or part of, as a tax." The word "remit" is defined as "to refrain from exacting." It is admitted that the Government was required by the decision of the Board to refrain from exacting and did refrain from exacting the tax. If this decision abated the tax, the bond, which obligated the petitioners to pay so much as was not abated, became of no effect, in accordance with its exact terms. The tax payer neither sought to prevent nor did prevent the Board from determining the controversy on the merits. It merely set up two defenses allowed by the Act, and the decision on limitations was the choice of the Board and not of the tax payer. It was the Tax Board's election over which the tax payer had no control.

3. The Court did not discuss the general powers of the Board over assessments or determinations of tax liability, but seems to hold that the Board can render a flexible decree, just as a court of equity. It is stated in the opinion, page 9:

> "The effective scope of the decision rendered is no broader than the issue, opinion and findings."

Petitioners contend that the Board cannot render a flexible decree. It has one and only one func-

tion under the Statute: to allow or disallow the Commissioner's final determination of tax liability, and a disallowance of a tax which has been assessed is an abatement.

Your petitioners pray, therefore, that an order be made for a rehearing of the argument in this case, on a day to be appointed by this court, at the present term, and upon such points as the Court may direct.

Respectfully submitted,

JOHN W. DRYE, JR.,
Counsel for Petitioners.

JOHN M. PERRY
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## CERTIFICATE OF COUNSEL

I, John W. Drye, Jr., counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JOHN W. DRYE, JR.

CORRECTED COPY p.p. 2-9

# SUPREME COURT OF THE UNITED STATES.

No. 24.—October Term, 1932.

Gulf States Steel Company and National Surety Company, Petitioners, *vs.* The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 7, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

In the District Court for Alabama — August 25, 1930 — the United States sued the Gulf States Steel Company, principal, and National Surety Company, surety, — petitioners here — upon a bond dated September 9, 1925, whereby they agreed to pay Snead, Collector of Internal Revenue, so much of the additional income and profits taxes for 1917 assessed by him against the principal in 1921 "as is not abated." Judgment on a verdict went for plaintiffs; the Circuit Court of Appeals affirmed; the matter is here by certiorari.

Petitioners say the sole question presented is whether the additional taxes were abated by the determination of the Board of Tax Appeals (July 10, 1928) in a proceeding brought by the Steel Company to review the Commissioner's final rejection of its demand for abatement. The Board held "that the respondent is now barred by statute from collecting any part of the additional assessment made in April, 1921, and that there is no deficiency for the year 1917." It directed entry of an order to that effect.

The petition for certiorari asserts: "The sole question in this case is whether the final decision of the Board that there was no deficiency 'abated' the tax." The following is the only specification of error relied on here—"That the Court erred in holding that the claim for the deficiency of taxes was not abated by the final decision of the United States Board of Tax Appeals that there was no deficiency." And in their brief counsel for petitioners say—"The sole question in this case is whether the final decision of the Board that there was no deficiency 'abated' the tax."

March 28, 1918, the Steel Company filed its income and excess profits tax return for 1917 and shortly thereafter paid the amount apparently due. In April, 1921, the Commissioner made a deficiency assessment of $153,815.30; May 6, 1921, the Company filed claim and demand for abatement of this entire sum upon the ground that the additional assessment was unwarranted and illegal in so far as it result[ed]—(1) From the failure to compute the invested capital by including the actual cash value of claimant's property on January 1, 1914; (2) From the action of the examiners in deducting only 7% of invested capital, instead of 8%; and (3) From disallowance of certain interest payments as part of invested capital.

March 13, 1923, fifteen days before the five-year statute would have barred collection of the deficiency assessment—the additional tax being wholly unpaid and the abatement claim undetermined—in order to secure delay and further consideration of objections, the taxpayer as principal, with the American Surety Company as surety, gave the Collector a bond for $175,350.00 which recites—

> "The condition of the above obligation is such that, if the said Gulf States Steel Company will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and expense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand Eight Hundred Fifteen and 30/100 Dollars ($153,815.30), claimed of it under the War Revenue Act of 1917, pending the filing, by the said Gulf States Steel Company of additional facts and information in support of a claim for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect."

April 3, 1925, in order to obtain release of the American Surety Company from the above-described bond, also to make certain the payment of whatever the ~~Collector~~ Commissioner might thereafter finally declare to be payable under the deficiency assessment of 1921, the Steel Company executed a second obligation and pledged as security Two Hundred Thousand Dollars U. S. Liberty Loan Bonds. This obligation recites—

"Whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand, Three Hundred and Fifty Dollars, ($175,350.00), and in favor of W. E. Snead, Collector of Internal Revenue, for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March, 1923, and was given in support of a claim for the abatement of assessments, penalties and interests, under the Revenue Act of 1917. Being desirous of relieving the above bound surety Company and further securing the payment of any amount found to be due the United States government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect."

September 9, 1925, the Steel Company as principal, and National Surety Company as surety, executed the bond in suit, conditioned as follows—

"Whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with the Collector of Internal Revenue for the District of Alabama at Birmingham. On the third day of April, 1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties and interest as is not abated. In lieu of surety on the above bond the said company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following described United States, Fourth Liberty Loan 4½% Gold Bonds of 1933-8 series, being of the par value of $200,000.00 (coupons), numbers . . . The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Ala-

bama. Now, therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to the said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by Law, then this obligation shall be of no effect. Otherwise, it shall remain in full force."

May 12, 1926, the Commissioner finally rejected *in toto* the Steel Company's long pending claim for abatement of the additional assessment of 1921 and gave proper notice. This notice among others things stated—"you are allowed 60 days (not counting Sunday as the sixtieth day) from the date of mailing of this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C., contesting in whole or in part the correctness of this determination."

By an original petition to the Board of Tax Appeals, July 9, 1926, the Steel Company asked a "redetermination of the deficiency set forth by the respondent [Commissioner] in his notice of deficiency . . . dated May 12, 1926." The prayer follows—

"The petitioner prays for relief from the deficiency asserted by the respondent and from payment of the taxes assessed in the following and each of the following particulars:

(a) That the petitioner be allowed as a deduction from its gross income for the year 1917, the sum of $47,021.82 as amortization of the cost to it of the lease (or stock) of Clinton Mining Company or as depletion or exhaustion of the leased properties based upon a cost of $145,000.00; or

(b) That the Clinton Mining Company be granted a reasonable allowance for the exhaustion or depletion of the leased properties based upon a March 1, 1913, value of the leasehold, and that amount so allowed be deducted in computing the consolidated net income of the petitioners and Clinton Mining Company for the year 1917:

(c) That the petitioner be allowed $11,000,000.00 in computing its invested capital for 1917, on account of the property paid in for stock on December 1, 1913.

Wherefore petitioner prays that this Board may hear and determine the deficiency herein alleged."

By an amended petition, March 2, 1927, (after *Bowers v. New York & Albany Lighterage Co.*, February, 1927, 273 U. S. 346,) the Steel Company renewed its request for "a redetermination of the deficiency set forth by the respondent in his notice of deficiency" dated May 12, 1926.

The petitions are identical except the amended one contains two new paragraphs which allege extinguishment through the Statute of Limitations of all liability of the Steel Company for the additional taxes; also the following new prayer—

> "(d) That the Board determine that the liability of the petitioner for the payment of the alleged deficiency has been extinguished by the running of the Statute of Limitations upon its collection and/or that the collection of said alleged deficiency was barred at the expiration of five years after said returns were filed."

The Board of Tax Appeals in July, 1928, held—"None of the bonds in the instant case can be said to constitute a consent in writing by both the Commissioner and the taxpayer to a later determination, assessment and collection of the tax in question, and no other exception to the running of the statute of limitations provided in any of the Acts being present, and no suit or proceeding for the collection of tax having been begun prior to the expiration of five years from the date of filing the return, and the five-year period having expired prior to the passage of the Revenue Act of 1924, we hold that the respondent is now barred by statute from collecting any part of the additional assessment made in April, 1921, and that there is no deficiency for the year 1917. *Bowers* v. *New York & Albany Lighterage Company,* [273 U. S. 346]; *C. B. Shaffer* v. *Commissioner,* [12 B. T. A. 298]; *United States* v. *The John Barth Co.* [279 U. S. 370]; *Art Metal Works* v. *Commissioner,* 9 B. T. A. 491. Our decision in this respect in no wise disposes of any questions arising as to liability on the bond." The consequent formal entry recites—"It is ordered and adjudged that the collection of the deficiency, if any, in income and excess profits taxes for the year 1917 is barred by the statute of Limitations . . ."

*Bowers* v. *New York & Albany Lighterage Co.*, February 21, 1927, 273 U. S. 346, construed the provision, Revenue Act 1921, prohibiting suit or proceeding for the collection of income or ex-

cess profits taxes, after five years subsequent to the return and held it applied both to suits in court and to distraint proceedings. Prior to this tax officers went upon the view that the statute of limitations did not apply to distraint.

*United States* v. *The John Barth Co.*, 279 U. S. 370, May 13, 1929, ruled that the limitation in Revenue Acts 1918, 1919, 1921 and 1924 upon the time within which income and excess profits taxes may be assessed and suits begun to collect is inapplicable where the suit is upon a bond given to secure payment of taxes theretofore returned and assessed, in order to obtain postponement of payment pending decision upon claim for abatement; also, that a bond made in such circumstances affords a cause of action separate and distinct from one to collect the tax.

Prior to 1924, in order to contest the Commissioner's assessment, the taxpayer had to pay the sum demanded and bring suit to recover. *Graham* v. *Dupont*, 262 U. S. 234, 258.

Title IX—Board of Tax Appeals—Act June 2, 1924, c. 234, 43 Stat. 253, 336, established the Board of Tax Appeals and authorized it to hear appeals from the Commissioner's action in respect of deficiencies before payments, etc. Under this act if the Board disallowed an alleged deficiency, thereafter the Commissioner could enforce collection only by suit in court.

The Revenue Act, February 26, 1926—Title X; Board of Tax Appeals—c. 27, 44 Stat. 9, 105, 107 amended Title IX—Board of Tax Appeals, Organization and Procedure—Act of 1924, supra, by adding thereto, among other things (under sub-title "Organization and Procedure") the following wholly new paragraph —"Sec. 906 (e). If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax." Sec. 274 (a) and (b) of this Act are in the margin.*

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*"Sec. 274 (a). If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed

The Revenue Act, May 29, 1928, "Title IV—Administrative Provisions", 45 Stat. 791, 871, 872, c. 854, amended the above quoted Section 906 (e) to read—"If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

The original Complaint in the present cause alleges that the Steel Company's claim for abatement of the additional assessment for the year 1917 was rejected by the Commissioner May 12, 1926, "for the full amount thereof, whereby there remained unpaid and unabated of the said assessment One Hundred Fifth-three Thousand, Eight Hundred Fifteen Dollars and Thirty Cents ($153,815.30), which said finding and determination of the Commissioner of Internal Revenue rejecting said claim for abatement has remained and now is in full force, vigor and effect, unvacated, unreversed and unmodified and is subject to no credits, set-offs or counterclaims other than hereinafter set forth." Petitioners denied this allegation. They maintained that the Commissioner's action had been reversed and the additional taxes abated by the opinion and ruling of the Board of Tax Appeals and this seems to have been the only point relied upon in the Circuit Court of Appeals which rejected petitioners' theory and approved the challenged judgment on the bond.

Concerning the Board's action that court said—"This is not a finding that the tax or any part of it should be abated. It does not abate any part of it. It is but a formal judgment that the tax,

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by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

"(b). If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment."

as tax, is, because the bar of limitations has fallen, not collectible. Since it is this and no more, it has the effect upon the suit on the bond here and no more, that the fact found in the Barth case and the legal conclusion there announced, that time had run against the tax and that it was therefore uncollectible, had on the suit on the bond there."

The bond in suit must be construed in the light of surrounding circumstances. *Hill* v. *American Surety Co.*, 200 U. S. 197, 203, 204, 205. They are narrated above.

As in *United States* v. *Barth, supra*, the plain purpose of the first bond—March 13, 1923—was to prevent immediate collection of the assessed additional taxes and to provide against any loss which might follow delay whether through extinguishment of rights under the Statute of Limitations or otherwise. We think it sufficiently clear that the two succeeding bonds were intended to continue the protection afforded by the first. The taxpayer, having attained its purpose through these bonds, now claims that the United States cannot enforce the obligation which induced the delay contemplated by all parties. It seeks escape through literal construction of a statute evidently designed to protect taxpayers in different circumstances.

Considering the state of the record, it is only necessary now to pass on one point—Were "the additional assessments, penalties and interest" "abated" by the Board of Tax Appeals' final determination, within the meaning of the bond in suit. Unless this is answered in the affirmative, the judgment below must stand. There is no suggestion that it should be upset upon any other ground.

Petitioners maintain that the Board had jurisdiction of the appeal from the Commissioner; that it definitely ruled "the collection of the deficiency, if any, of income and excess profits taxes for the year 1917 is barred by the Statute of Limitations" and that the necessary result of this ruling was abatement of the additional assessments, mentioned in the 1925 bond. This conclusion, they say, is inescapable under the clear mandate of Section 906 (e), Revenue Act of 1924, as amended by the Acts of 1926 and 1928—"If the assessment or collection of any tax is barred by any Statute of Limitations the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

As the provisions of Sec. 906 (e) first came into the law after execution of the bond, they could not then have been within contemplation of the parties. The bond of 1925, like the two preceding ones, was given to protect the United States against loss; it referred to the tax liability existing March 13, 1923,—$153,815.30—and was intended to guarantee payment of that sum unless reduced or annulled by some future payment of the Commissioner. Payment might have been enforced; but the taxpayer claimed the amount assessed was too high and procured further delay for investigation by executing the bond. The possible abatement—partial reduction or annulment—there referred to depended upon the future decision of the Commissioner.

On appeal to the Board the taxpayer challenged the assessment as erroneous; also, because under the Statute of Limitations there remained no right to enforce the tax. As to the first ground, the Board found nothing. It declared only that the Statute had run against the right to collect the tax — this upon the taxpayer's prayer. In no proper sense was there a redetermination of the deficiency assessed in 1923. The anticipated bar of the tax by the Statute could not affect the controversy—was not the point in issue, was not disputed. The bond required payment of a stated sum under the assessment already made, unless this should be abated by the Commissioner. What abatement should be allowed was the matter before him and a reexamination of his determination was necessarily limited to those matters which might have been presented to him. By the prayer based on the statute of limitations the taxpayer defeated a determination of the real controversy.

In the circumstances, possibly, a decision upon the merits might have been regarded as the Commissioner's action within the implication of the bond. The effective scope of the decision rendered is no broader than the issue, opinion and findings. It left undisturbed the Commissioner's assessment of 1923. This the bond undertook to pay wholly without regard to the right to enforce the tax as such.

The existence of the bar under the Statute, as against the lien or right to enforce the tax as such, was never the subject of controversy—was not denied. And as the present suit is not to enforce the tax as such, but an obligation given in contemplation

of the loss of right to enforce, a decision proclaiming this loss is but announcement of something expected by all parties—an unfruitful pronouncement upon an immaterial point. *United States* v. *Barth, supra.* See *United States* v. *Martin Hotel Co.*, 59 F. (2d) 549. As the Board failed to pass upon the Commissioner's refusal to reduce the amount of the assessment, that sum, with interest, etc., now represents what is due upon the bond. The Board expressly disclaimed purpose to rule concerning this obligation—the question was not present. It might, with propriety, have examined the objections to the amount of the 1923 assessment; but the taxpayer asked another course.

Section 906 (e) may find proper application on an ordinary appeal, as for example, where the Commissioner's right to assess is challenged because the Statute of Limitations had run, or where, as in *Bowers* v. *New York & Albany Lighterage Co., supra,* the Collector asserts the right to enforce payment by distraint after the statutory bar. It can have no application to what may have been said or done by the Board when undertaking to redetermine a deficiency having no possible relation to the Statute of Limitations.

The literal construction of Sec. 906 (e) proposed by the petitioners would lead to consequences manifestly unjust, if not absurd. When the bond in suit was executed the Statute had extinguished the right of the United States to enforce the tax as such. That Congress thereafter actually intended to release the parties whenever the Board should declare this fact is beyond belief. The thing announced by the Board had no real relation to the obligation of the bond. When possible, every statute should be rationally interpreted with the view of carrying out the legislative intent. We cannot attribute to Congress the purpose necessary to support petitioners' urgence.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

END OF CASE